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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-661

JOSEPHINE GOSS, ET AL.,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF OF KNOXVILLE, TENNESSEE, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, ET AL

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
COUNTERSTATEMENT OF QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
COUNTERSTATEMENT OF THE CASE	3
HISTORY	3
CURRENT PLAN	5
1971 REVISION OF DESEGREGATION PLAN	7
COMMENTS ON PETITIONERS' STATEMENT OF CASE	8
ARGUMENT	9
EVIDENCE SUPPORTS COURTS' FINDINGS	9
PETITIONERS' CHIEF EVIDENCE	11
BUSING IS NOT PRACTICAL	12
CONCLUSION	15

TABLE OF CITATIONS

Cases:

Alexander v. Holmes Board of Education, 396 U.S. 19, (1969)	4
Brown I v. Board of Educ., 347 U.S. 483 (1954)	3, 4, 8, 15
Davis v. Board of School Commissioner's of Mobile, 402 U.S. 33, (1971)	8
Davis v. School District of City of Pontiac, 443 F.2d 573 (6th Cir. 1971), cert. denied, 404 U.S. 913 (1971)	9
Goss v. Board of Educ., 444 F.2d 632 (6th Cir. 1971)	4
Goss v. Board of Educ., 406 F.2d 1183 (6th Cir. 1969)	4

Goss v. Board of Educ.,
340 F. Supp. 711 (E.D. Tenn. 1972) 4, 7, 8

Goss v. Board of Educ.,
320 F. Supp. 549 (E.D. Tenn. 1970) 4, 8, 11, 12

Goss v. Board of Educ.,
270 F. Supp. 903 (E.D. Tenn. 1967) 3, 4, 7, 12

Kelley v. Metropolitan Board of Educ. of Nashville and Davidson County, Tenn.,
463 F.2d 732 (6th Cir. 1972), cert denied,
____U.S.____ (1972) 9

Lemon v. Kurtzman,
____U.S.____, 41 U.S. Law Week 4467
(April 2, 1973) 10

Mapp v. Board of Educ. of Chattanooga,
____F.2d____ (6th Cir. 1973) 9

Northcross v. Board of Educ. of Memphis City Schools,
466 F.2d 890 (6th Cir. 1972) 9

Swann v. Charlotte-Mecklenburg Bd. of Educ.,
402 U.S. 1 (1971)..... 5, 7, 10, 14

INDEX TO APPENDIX

Opinion of Three Judge Court of Appeals 1b
Opinion of 270 F. Supp. 903 (E.D. Tenn. 1967)..... 11b
Opinion of 320 F. Supp. 549 (E.D. Tenn. 1970)..... 27b
Opinion of 444 F.2d, 632 (6th Cir. 1971) 41b

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-661

JOSEPHINE GOSS, ET AL.,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, ET AL.,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, ET AL

OPINIONS BELOW

The certiorari petition correctly lists the reported opinions in this case except that it omits two reported memo decisions, 371 U.S. 811 (1962) and 319 F.2d 857 (6th Cir. 1963). It also omits the unreported three Judge per curiam

opinion of the Sixth Circuit which is set out in the appendix to this brief at Pages 1b-10b.[1] For the convenience of the Court the following additional opinions in this case are included in the appendix to this brief. 270 F.Supp. 903 (E.D. Tenn. 1967) (11b), 320 F. Supp. 549 (E.D. Tenn. 1970)(27b), 444 F.2d, 632 (6th Cir. 1971) (41b).

JURISDICTION

Jurisdictional requisites are adequately set forth in the certiorari petition (p.2).

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does a dual school system become a unitary system when no school is recognizable as a black or white school by reason of the faculty and staff, quality of buildings and equipment or extracurricular activities and the Board has taken all practical steps to eliminate student bodies with a racial composition substantially disproportionate to the entire system?

2. May a school board continue to operate a neighborhood school zone system which was approved by the trial court and upheld by the Court of Appeals and became the law of the case when the time expired for further appellate procedures when the black students which are 16 1/2% of the total enrollment attend 75% of the schools, all schools are attended by white students, and the neighborhood residential pattern which causes the difference in the racial composition of the schools was not the fault of the school board?

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[1]Citations in the form "-A-" refer to the appendix prepared in the last trial, No. 72-1766 and 72-1767 before the Court of Appeals. Citations in the form "-a-" refer to the appendix to the Petition. Citations in the form "-b-" refer to the appendix to this brief.

3. When the racial imbalance of the students in the school is the result of residential patterns which the school board did not cause and the board operates a neighborhood school zone system which achieves the greatest practical degree of actual desegregation, is the Board required by the Constitution to acquire and operate a transportation system which it does not have and cannot afford when the Plaintiffs failed to present any creditable evidence that the situation could be improved by busing?

4. When the trial judge has described the school board's plan as being "a vigorous, straightforward and expertly managed program of integration" and the court has obtained the "full cooperation of the Defendant Board of Education in the effort to satisfy the constitutional mandate of *Brown I* and subsequent Supreme Court cases" and the Negros may live in any area of the City and attend the school in their neighborhood or be transferred at school board's expense to a school in which their race is in the minority, is the Board required to bus students because of the existence of a few schools with a majority black student body?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The certiorari petition correctly lists the constitutional and statutory provisions (p. 3).

COUNTERSTATEMENT OF THE CASE

History

A concise and clear history of this long and difficult litigation from its commencement in December, 1959, until June, 1967, is given by Judge Taylor in 270 F. Supp. 903, 904-12 (12b-20b). The plan of desegregation is set out in footnote number 4. This history is brought current by

Judge Taylor in 340 F. Supp. 711, 711-713 (7a-9a). The plan of desegregation set out in footnote 4 was amended by the changes effective in September, 1972, given by Judge Taylor on pages 719-720 (15a-16a).

For the purposes of this Petition, the important history begins with the trial in May, 1967. One of the issues submitted by the plaintiffs and accepted by the Court at this 1967 hearing was "whether or not the Knoxville Public Schools System is effectively desegregated in compliance with the Fourteenth Amendment to the Constitution of the United States in relation to (1) pupil assignment (2) faculty." 270 F. Supp. 903, 911.

Judge Robert L. Taylor at 270 F. Supp. 903 held that Knoxville had achieved a unitary system and struck the case from his docket. The Court of Appeals in 406 F. 2d 1183 (6th Cir. 1969) affirmed the District Court in every respect but instructed the Court to retain the case on its docket to insure future compliance with *Brown I*. No petition for certiorari was filed so this became the law of the case.

In November, 1969 the Plaintiffs filed a Motion for Immediate Relief based upon *Alexander v. Board of Education*, 396 U.S. 19, (1969). The motion complained of gerrymandered geographic zone lines, assignment, hiring and discharge of school personnel and planning, designing, locating and construction of new schools and additions or expansions of existing schools. After another full evidentiary hearing on all aspects of the Board's plan as practiced since 1967, the District Court again held that Knoxville was operating a unitary system, 320 F. Supp. 549 (27b). The Court of Appeals in an opinion found at 444 F. 2d 632 (41b) made extended comments approving the neighborhood system developed in

Knoxville. The case was remanded for further proceedings consistent with *Swann v. Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1971) and other relevant Supreme Court Opinions announced on April 20, 1971.

The Plaintiffs filed a Motion for Immediate Relief with Mr. Justice Stewart which was denied.

Back again in the District Court the pretrial order of August 16, 1971 defined the issue to be tried as "Whether or not the Knoxville City School System is a unitary school system within the meaning of *Swann v. Mecklenburg* and related cases." (A1511) After seven days of trial the Court again held that the Knoxville School Board is in full compliance with the Constitution and is maintaining a unitary system free of the vestiges of segregation that existed prior to 1959. This opinion was affirmed in a unanimous per curiam opinion filed by Judges Weick, Miller and Lively (1b). Judge Lively filed a separate concurring opinion (9b). The Plaintiffs filed a petition for hearing en banc which was granted. The full Sixth Circuit Court of Appeals en banc unanimously approved the action of the District Court (1a-6a).

Current Plan

The essence of the present Board plan, most of which became effective ten years ago in September, 1964, is that all racially discriminatory practices in all grades, programs and facilities of the Knoxville Public School System shall be eliminated and abolished. Faculty and supporting staff insofar as it is administratively sound are assigned so that the faculty of each school reflects the racial composition of the school system as a whole. Each student is assigned to the school designated for the District in which the student legally resides, subject to variations

due to overcrowding. A plan of school districting based upon the location and capacity of school buildings and the latest enrollment studies is followed subject to modification from time to time as required. Transfers are permitted only for vocational or special education classes and majority to minority race transfers. Transfers must be renewed annually and will be honored only so long as the transfer basis remains valid. Transportation at School Board expense is provided for majority to minority race transfers.

As shown by Exhibit 9 (A. 21,1520) Knoxville began its desegregation efforts in the school year 1960-61 with 22,600 students. Only 30 of the 4,978 Negro students attended mixed schools. This number increased each year until 1970-71 when all Negroes, who comprise 16 1/2% of the student body, (table on 12a) attended schools with a racially mixed student body. The number of schools with only Caucasian enrollment has steadily dropped from a high of 43 in 1963-64 to 16 in 1971-72. Every school now has a mixed staff with the black teachers in each school in about the same proportion as the students in the system as a whole (A. 27-34). Schools are not identifiable as black or white by extracurricular activities (A.42) or maintenance of buildings or equipment (A.43,1250).

Knoxville has never had a transportation system (A. 38-42). With the annexation of a large area of the County in 1963 the City and County entered into an agreement whereby the County would continue to bus the students to the neighborhood school in the annexed area in the same manner they were bused prior to annexation. As part of the desegregation plan students from the vocational wing of Austin-East are bused about a mile to the academic wing and vice versa and transportation is provided for certain severely mentally retarded students.

1971 Revision of Desegregation Plan

After the case was remanded for consideration in light of *Swann*, the Knoxville School Board employed Dr. Charles Trotter of the School Planning Laboratory at the University of Tennessee (A.46). He was asked to draw up a plan for Knoxville which would get the best desegregation of the schools and get the best mix of students without busing (A.407). Dr. Trotter drew up an extensive plan which was adopted by the Board with a couple of minor exceptions. Dr. Stolee, the Plaintiffs' chief expert, agreed that Dr. Trotter had devised the best plan possible without busing the students (A.1420-1421). Both experts agree that Knoxville had gone as far as it could in mixing the students without busing them (A.407,411,439,1420). As the Trial Judge found, the zone lines are not gerrymandered and the attendance in each school reflects the residential patterns of the community around each school. 270 F. Supp. 903, 913 (21b). He further found that the policies of the Board of Education did not cause the residential racial patterns. 340 F. Supp. 711, 728 (24a). No child is locked into a school in which his race is in the majority. This suit can be summarized in the Trial Judge's own words:

> "The Court finds that after a slow start the Board of Education has moved with commendable zeal, conscientiousness and results toward the integration of the schools and faculties in an enormously complex situation." The Knoxville plan has been ". . . a vigorous straightforward and expertly managed program of integration". 270 F. Supp. 903, 916 (24b).
>
> "The history of this case, unlike that in *Swann* reveals that the Court has had the full cooperation of the Defendant Board of Education in the effort to satisfy the

constitutional mandate of *Brown I* and subsequent Supreme Court cases." 340 F. Supp. 711, 713 (9a).

Comments on Petitioners' Statement of Case

The Petitioners assert (p. 4) that despite continuing and substantial school segregation in Knoxville, the Court of Appeals affirmed in 1969. The Statement then summarized the opinion as approving "severely racially imbalanced schools in a historic dual system". This is not a fair summary of this case. This 1969 opinion was decided before *Davis v. Board of School Commissioner's of Mobile* 402 U.S. 33, (1971) established for the first time the requirement that the Board should make every effort to achieve the greatest possible degree of actual desegregation taking into account the practicalities of the situation. This Court of Appeals decision held that the fact that certain schools were attended predominantly by Negroes did not by itself without other proof establish that the Defendant was violating the constitutional rights of the Plaintiffs. The opinion upheld the District Court but ordered it to retain the case on the docket in the event the Board of Education wished to consider some pairing of the existing schools or alterations of its plans for future construction. The Court made no suggestions or commands.

The Statement continues (p. 5) by saying that except for a few problems Knoxville's unitary system was approved. Footnote 8 which cites no authority says there were loose transfer rules and unique grade organization and attendance zoning patterns. Although the Plaintiffs made these contentions (they were denied by the Defendants) they were never able to present creditable evidence to prove their contentions. (For example, see 21a-"Transfer Policy"; 320 F. Supp. 549, 557 (35b). The Statement concludes by saying that the District Court ruled that the zones were

reasonably drawn even if they did not achieve desegregation and that the system was therefore unitary. The District Court did hold that the zones were reasonably drawn and that Knoxville had established a unitary system. It further held that Knoxville has not excluded any pupil from any school directly or indirectly on account of race. Therefore, Knoxville does have a desegregated system even though racial imbalance because of residential patterns the Board did not cause remains in some schools.

ARGUMENT

Evidence Supports Courts' Findings

The Petitioners' only complaint is that Knoxville has not been required to bus students for racial balance when other cities have. The Court of Appeals has given a complete answer to this contention.

> "Appellants complain that the result in this case is inconsistent with that reached by this Court in other school desegregation cases. If the result is different, it is only because the evidence produced in the District Court required a different result. The brief answer to the principal arguments of appellants is that the proof relied upon by them in the District Court and now reviewed by this Court sitting en banc failed to establish their contentions. We do not depart from the principles enunciated by this Court in *Northcross v. Board of Education of Memphis City Schools*, 466 F.2d 890 (6th Cir. 1972); *Kelley v. Metropolitan Board of Education of Nashville and Davidson County, Tennessee*, 463 F.2d 732 (6th Cir. 1972), *cert. denied*, —U.S.— (1972); *Mapp v. Board of Education of Chattanooga*, —F.2d— (6th Cir. 1973) and *Davis v. School District of City of Pontiac*, 443 F.2d 573 (6th Cir. 1971), *cert. denied*, 404 U.S. 913 (1971).

"This Court has consistently upheld the decrees of the District Judges of this Circuit when properly supported by the pleadings and evidence. An appellate court simply cannot violate this settled principle of our jurisprudence, no matter how desirable a particular result may appear to be. The experienced District Judge who has lived with this case from its inception analyzed the evidence in great detail. His findings are supported by substantial evidence and are not clearly erroneous. As the Supreme Court, speaking through Chief Justice Burger, has recently written:

In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow. *Lemon v. Kurtzman*,—U.S.—, 41 U.S. Law Week 4467 (April 2, 1973)"

Before proceeding, the Court should clearly understand that the defendants have established a unitary system under the criteria set out in *Swann*. In *Swann* the Court said that first the school itself must be looked at without the children. Can it be identified as either white or black by its faculty or staff, maintenance of buildings and equipment and extracurricular activities. Once the school cannot be so identified, then the Board has the obligation to establish the greatest practical mix of the students. This the Knoxville School Board has done.

The Petitioners argue that their evidence should produce busing in Knoxville and concludes that since the Court did not order busing, it has misapplied the law. The Knoxville plan of desegregation has never been static but from its inception in 1959 has used the techniques approved in *Swann* except massive busing. The results of this process is that no student in the system is excluded from any school because of race or color (23a-25a). In other

words, no matter where a child lives in Knoxville, he or she may attend the school nearest to his or her home. If his race is in the majority in that school, he or she may attend at School Board expense a school in which his race is in the minority. He is not locked into the neighborhood school. There is extensive evidence in the record to support the trial court's finding that the residential patterns are not the result of School Board action (24a-25a).

Petitioners' Chief Evidence

The Petitioners' chief evidence (p. 7) that busing is necessary is that seven schools are "virtually all black schools" and three others have a majority of black students. The seven schools are listed in footnote 16 on page 9 of the Petitioners' brief. This static presentation of the situation in the school year 1971-72 ignores important underlying facts.

Austin-East is the result of pairing Austin High School which was the black high school with East High School which was a white school. Cansler was closed at the beginning of the 1973-74 school year as a regular elementary school (16a). Greene is in a large urban renewal area and its racial composition in the future is uncertain (320 F. Supp. 560; 14a). The white school in the Maynard area, Moses, has been closed (16a). Sam Hill was paired with Lonsdale, a white school, beginning the school year 1973 (15a). The three remaining schools which the Petitioners do not name, are Park Lowry and Fairgarden, which were white schools in 1959 (See Table 14a), and Beardsley Junior High School which now houses both white and black junior high school students for the Rule High School zone (16a).

The Petitioners state on page 10 that the present zone lines are nearly identical to the zone lines prior to this

suit. Since the school Board has developed a neighborhood school plan under which the students will attend the school closest to their home, the school Board has never contented that the school zone lines will be radically changed except at the periphery of the zone and except when schools are paired and new schools constructed. The location of zone lines have been extensively litigated several times (270 F. Supp. 903, 913 (21b); 320 F. Supp. 549, 556 (34b)).

Busing Is Not Practical

The Petitioners argue on page 10 that other school districts have been ordered to bus students when there have been natural and artificial boundaries, such as highways. If this were the only evidence the School Board's case would be very weak. This evidence was only a small part of the evidence that cross-town busing is not practical in Knoxville. The evidence on this issue is extensive and complex. No attempt will be made here to review it in detail. The facts are that to achieve equal balance about two black students should attend each classroom of twenty students throughout the system. Most of the black students live in east Knoxville with Tennessee River with few bridges on the south, ridges with few cross-throughs on the north, and the major business district of Knoxville to the west. These black children must be interchanged with white children to the south, west, and north during the morning rush hour. The first problem is selecting the specific children to be transported to specific schools which is a very practical problem when 5/6ths of the Negroes must be transported (A1351-1352). There is proof in the record that substantial numbers of blacks are not prepared for cross-town busing (A851, 870-874, 1099-1100). The next problem is the inter-relationship

between the importance of the safety of the children who must walk to school between sunup and the beginning of school and between the end of school and sundown, the length of the school day and the time it takes to get from home to school and back. The Board of Education does not have a transportation system (A38-42). Children in the old city before annexation either walk to school or provide their own transportation (A40). Children in the annexed area are transported at County expense under the annexation agreement if they live more than one and one-half miles from school (A-41). Dr. Stolee, the Petitioners' chief expert, prepared a plan under which the buses for racial balance would pick the children up at the neighborhood school rather than the homes (A1391). This would mean the children in the annexed area who live more than one and one-half mile from school would ride two buses. It would also mean that children who walk to school would have to be allowed enough daylight time to get to school before they are bused across town (A720-721). The Board of Education has never contended that because of the geography of Knoxville it is impossible to bus children. It is the Board's position that because of the time factors involved, it is not practical for children to walk to school safely, then be bused to another school and get in a full day's schoolwork. There are also substantial problems in busing in urban areas as distinguished from rural areas (A 714-719).

Another major problem is one of cost. Knoxville would not only have to acquire and operate a school transportation system but it would also have to develop sixth grade centers and other centers suggested by Dr. Stolee, which involves the reorganization of the entire school system. The City of Knoxville provides about 7% of the funds to operate the Knoxville schools (A 884). The rest comes

from the County, State and Federal funds. Under the State law the City is not eligible to receive state funds for transportation (A 672, 706), so that the entire burden of this massive plan would fall exclusively on the taxpayers of the City of Knoxville. Knoxville's financial inability to bear this burden is extensively documented in the evidence. It's present tax rate is the highest permitted by its charter (A 503, 505, 548) and it is in a critical financial situation (A 504).

The Court of Appeals decision recognized that the Trial Court correctly followed *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The evidence in this record is abundant that over the years the racial composition of the teachers and staff, the quality of the school buildings and equipment, and the organization of sports and extracurricular activities have been the subject of frequent hearings. The testimony at the last hearing fairly summarized the progress to date and supports the findings of the Court that schools cannot be identified racially on these criteria. The record in this case is also abundantly clear that over the years the school Board has had the burden of showing that student assignments are genuinely nondiscriminatory and not the result of present or past discriminatory action of the Board and has carried the full burden of justifying one-race schools.

Footnote 13, page 7 of the Petition states that Counsel for the School Board has declined to make available to the Petitioners the current (1973-74) school enrollment figures. This is denied by Counsel for the Defendants and if it becomes material, they will submit an affidavit of the true facts. Furthermore, it is most unusual for information not in the record which the parties have not had an opportunity to comment upon or explain by their witnesses, to be considered on a Petition for Certiorari.

In footnote 24, page 15, the Petitioners quote from an opinion by Judge Taylor which was decided before the *Brown* decision. Under the law at that time, the Board of Education was required by the Tennessee Constitution to operate a dual system and is therefore, completely irrelevant in light of the law as it has developed after *Brown*.

CONCLUSION

For the reasons herein discussed, the Defendants submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Appendix

Nos. 72-1766, -1767

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOSEPHINE GOSS, ET AL.,
Plaintiffs-Appellants,

v.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, ET AL.,
Defendants-Appellees.

APPEAL from United States District Court for the Eastern District of Tennessee.

Decided and Filed March 29, 1973.

Before WEICK, MILLER and LIVELY, Circuit Judges.

PER CURIAM. This case is before us for the fifth time, and was heard by the panel after plaintiffs-appellants' motion for an en banc hearing was denied. The history of the litigation is adequately portrayed in the previous opinion of this Court reported in 444 F.2d 632 (6th Cir. 1971), and the opinions of the District Court cited therein, and need not be repeated at length here. Suffice it to say that as far back as 1967 the District Court held that Knoxville had achieved a unitary school system. 270 F.Supp. 903 at 918 (1967). We affirmed in 406 F.2d 1183 (1969). No attempt was made to obtain Supreme Court review of this decision and it became final.

A few months later the plaintiffs filed in the District Court a motion for immediate relief, grounded upon *Alexander* v. *Holmes Co. Bd. of Education*, 396 U.S. 19 (1969). The District Court conducted another evidentiary hearing and again held

that Knoxville was operating under a unitary system. 320 F. Supp. 549 (1970). Plaintiffs again appealed.

During pendency of the appeal, *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), and other companion cases were decided. Relying on these cases, the plaintiffs filed a motion in that appeal and in other appeals then pending, asking that we command the District Court to order the Board of Education to adopt a number of elaborate rules and directives to accomplish desegregation. These were apparently based on District Judge McMillan's order in *Swann*, with some extensions and elaborations.

In our opinion reported in 444 F.2d 632, referring to Judge McMillan's opinions, we stated:

> "The District Court opinions reflect in observable measure Judge McMillan's doubts as to the genuineness of the school authorities' concern for the constitutional rights of both the black and white school children of Charlotte and Mecklenburg Counties. The broadness of their commands bespeak some motivation of reprisal. In the long history of the litigation we deal with, we find no such bitter contesting between the school authorities of Knoxville and the court, nor between the plaintiffs and the school authorities. We, therefore, initially observe that while the Supreme Court found legally tolerable what may be referred to as the *Mecklenburg* rule, it by no means directed that its commands be obeyed everywhere. We, therefore, conclude that there is nothing in *Swann* (1971) that requires us to announce a fiat imposing on Knoxville the identical pattern fashioned by Judge McMillan for his case." 444 F.2d at 636.

We further stated:

> "*Swann* v. *Charlotte-Mecklenburg, supra*, [402 U.S. 1 (1971)] . . . approved a District Court ordered plan for the busing of children to improve the racial mix in the involved school system. It did not, however, direct that a plan of transporting school children must be a part

The court further stated:

"In the summer of 1971, the Board, in an effort to comply with the new guidelines laid down in Swann v. Charlotte-Mecklenburg Board of Education, amended its desegregation plan to establish the following policies:

1. Authorized the creation and maintenance of a pupil locator map.

2. Established a policy of assigning faculty and supporting staff, insofar as is administratively sound, to have the faculty of each school reflect the racial balance of the school system as a whole.

3. Revised transfer policy to permit only two classes of transfers: (1) vocational or special education transfers and (2) majority to minority race transfers. These transfers must be renewed annually and will be honored only so long as the transfer basis remains valid.

4. The following zone adjustments were made:

(a) Pair Sam E. Hill and Lonsdale Elementary Schools;

(b) Move the severely mentally retarded program at Beaumont and the pre-school program at Moses to Cansler; and close the regular program at Cansler by dividing its regular pupils between Beaumont and West View (West View is 100% white);

(c) Move the regular program at Moses to Maynard and expand the special education program at Moses;

(d) Organize Beardsley as a two-year junior high and Rule as a four-year senior high serving the present Rule-Beardsley attendance zones;

(e) Move the Austin-East zone line further east;

(f) Pair the vocational programs at Austin-East and Fulton;

5. Assured election of minority race cheerleaders. The Board has agreed to and will pay transportation

> expenses of all students who transfer under the majority to minority transfer provision. See 402 U.S., at 26-27, 91 S.Ct. 1267, 28 L.Ed.2d 554." 340 F.Supp. at 719.

The Board, after adopting the zone changes, retained Dr. Charles Trotter of the University of Tennessee to prepare a school zone map from the pupil locater data that would achieve the maximum racial mix without bussing children. As to Dr. Trotter's map, the court stated:

> "Except for two major differences, his zone map is essentially the same as that adopted by the Board. Dr. Trotter zoned 150 white pupils living in Norwood to Rule High School. These children are presently being transported to West High by the County under the Local Sales Tax Agreement. Assistant Superintendent Bedell testified that this suggestion was not adopted because of distance and safety factors. In order to get from Norwood to Rule it is necessary to make two crossings of an interstate highway at a cloverleaf with no crosswalks. In addition, if zoned to Rule these children would live less than one and one-half miles from the school and would not be eligible for County transportation. The other major difference is that Dr. Trotter adjusted zone lines in East Knoxville based on present pupil location data.
>
> Dr. Trotter testified that the residential concentration of blacks in Knoxville into three geographically well-defined areas made it impossible to obtain the same degree of racial mixing in each school with a neighborhood pupil assignment system. He said that improvement on his plan would require massive cross-town bussing." 340 F.Supp. at 720.

The plaintiffs retained Dr. Michael Stolee who presented a plan which would require massive bussing of from 8,000 to 10,000 children and the acquisition of 80 busses. While Dr. Stolee estimated the annual cost of only $190,000 a year, witnesses of the Board placed the cost at from $300,000 to $500,000 per year depending on whether the school children are

picked up on the street or at schools. The Stolee plan also provided for extensive changes in the manner in which certain schools would be utilized, and for changes in equipment. No one estimated the cost of these changes.

Dr. Stolee did agree, however, that Dr. Trotter's plan was the best plan possible for mixing the students without bussing.

It was Dr. Stolee's view that a school system containing 16.5% black children should have a 10% to 30% enrollment of blacks in each school in the system in order to be desegregated. This is the quota system. He was of the opinion that Knoxville was not desegregated because only eight of its schools meet this test. He testified it would not be possible to have a good desegregation plan without bussing.

The Court found that Dr. Stolee in the preparation of his plan relied on current enrollment figures for each school and used existing elementary school boundaries. He did not use the pupil locator map which the Board provided at our suggestion although it was available to him. In this respect the Court stated:

> "The Court has studied the pupil locator data and realizes that a plan based on that information would require time-consuming, tedious, and exhausting effort. Dr. Stolee's failure to use this data substantially reduces the weight of his testimony." 340 F.Supp. at 721.

The court further stated:

> "After careful study of the Stolee plan, we are convinced that Dr. Stolee grossly understated the actual amount of bussing and the distances involved in his plan. The many serious oversights in his plan and his failure to utilize the pupil locator data prevent his plan from serving as a workable alternative to the Board's plan. It is evident that Dr. Stolee did not devote the time to his plan necessary to do a professional job. This failure combined with his manifest interest in this type of case seriously undermines his credibility as an expert witness.

> If implemented his plan would disrupt the Knoxville School system and the lives of parents and children in many households.
>
> In addition to the patent weaknesses in the Stolee plan, Dr. Bedell pointed out some of the shortcomings of the plan. A number of these are significant. They are as follows:
>
> (1) The plan discriminates against black high school students without private transportation who are bussed out of their neighborhoods and who want to participate in after-school extra-curricular activities such as athletics.
>
> (2) The plan did not consider plant capacity. It would require one hundred additional classrooms at some schools while underloading others.
>
> (3) Implementation of the plan would require legal arrangements between the City Board of Education, the County Board of Education, the City Council, the County Court and the State Department of Education. Negotiation of these arrangements could take many months.
>
> (4) By removing the ninth grade from certain junior high schools, the plan deprives these schools of state funds for guidance counselors." 340 F.Supp. at 724.

In the evidentiary hearing evidence was offered that the City of Knoxville, which is the source of the Board's funds, is in financial straits; that a $400,000 deficit in the City's budget carried over into 1972. The Mayor estimated that the School Board's budget has a deficit of about $800,000. The School Board already owes the city $600,000 and cannot pay it. Ninety percent of the Board's budget is consumed for salaries.

Davis v. *School Comm'rs of Mobile Co.*, 402 U.S. 33, 37 (1971), required the Board to provide "greatest possible degree of actual desegregation taking into account the *practicalities* of the situation." (Emphasis added.) The Board has done just that as the District Court found. The Board was

not required to wreck the educational system in order to provide for massive bussing.

One other thing should be mentioned. The District Court found:

> "The Knoxville School Board has not excluded any pupil from any school, directly or indirectly, on account of race. Knoxville's residential segregation has contributed 'to disproportionate racial concentrations in some schools,' but this is not the fault of the School Board." 340 F.Supp. at 728.

In the evaluation of the testimony of expert witnesses, we ought not disturb the District Judge's determination unless he has abused his discretion, which we do not find.

One thing which is clear from *Brown I*,[1] *Brown II*,[2] and *Swann* and related cases is that District Judges are granted wide authority and discretion to fashion equitable remedies. In following these decisions and upon careful consideration of the record, it is our opinion that the findings of fact of the District Court are supported by substantial evidence and are not clearly erroneous.

We did not say in our remand that the District Court should order bussing. In fact, we said that *Swann* did not "direct that a plan of transporting children must be a part of every new plan for improvement of the objective of desegregation." We regarded bussing as only a tool but not a mandatory tool in every school desegregation case.

We remanded for consideration in the light of *Swann*, and related cases. In Judge Taylor's well-reasoned opinion, he did exactly that and we think he correctly applied the law of those cases. Judge Taylor did carefully consider bussing and determined that it was impractical and not required.

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[1] *Brown I*, 347 U.S. 483 (1954).

[2] *Brown II*, 349 U.S. 294 (1955).

In the concluding paragraph of his opinion, Judge Taylor said:

> "No child is excluded from any school in the Knoxville school system because of his race or color. Thus, the Knoxville system is a unitary system within the meaning of *Alexander*. As Knoxville school children are assigned to schools on the basis of their residence and without regard for their race, the system is not a dual system as was defined in *Green*. Disproportionate racial mixtures in some of the Knoxville schools are the result of residential patterns. *Swann* is clear that the school authorities are not expected to prevent different treatment of the races outside the schools. 402 U.S., at 22-23, 91 S.Ct. 1267, 28 L.Ed.2d 554. The racial composition of the Knoxville schools is not the result of present or past discriminatory action upon the part of the School Board. Knoxville is in compliance with *Swann*. Accordingly, Knoxville is operating a unitary school system consistent with constitutional requirements." 340 F.Supp. at 729.

We do not consider attorneys' fees since plaintiff did not prevail in the District Court or here. Moreover, there was no wilful refusal of the Board to comply with orders of the Court.

Affirmed.

LIVELY, Circuit Judge, concurring:

I would affirm the judgment of the District Court because it has complied with the directions of this Court as contained in the opinion of Judge O'Sullivan in 444 F.2d 632 (6th Cir. 1971). The situation before Judge Taylor upon remand from this Court was quite different from that faced by Judge McMillan in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). In this case the District Judge had two plans presented to him for further desegregation of the Knoxville School system. As his opinion demonstrates, there were a number of reasons for giving less weight to the plan offered by the plaintiffs than to the one offered by the Board of Education. As trier of the facts it was his responsibility to make judgments on the weight of evidence and credibility of the various witnesses.

While it is true that some schools in the Knoxville system will remain identifiably black or white on the basis of pupil enrollment, this is largely the result of several concentrations of blacks in the area of East Knoxville. In *Swann* the Supreme Court recognized that there are frequently concentrations of minority groups in one or more parts of a metropolitan area and the existence of a small number of racially identifiable schools in these areas is not, in and of itself, a sign that a dual system exists.

The school authorities have taken affirmative action to improve the racial mix of the schools, as required by our previous decision. Furthermore, the appellee presented evidence from which the Court was justified in finding that no plan involving the transportation of pupils between non-contiguous zones would be feasible at this time. However, I do not believe that the inconclusive evidence in this record concerning the financial condition of the City of Knoxville provides sufficient reason for failing to order the transportation of pupils if the Board of Education of Knoxville were found to be operating a dual public school system which required busing in order to become a unitary system.

Having found that a unitary school system exists, the District Court acted within its discretion in refusing to adopt a plan which would require busing of a large number of pupils in order to obtain a certain percentage of black students in each school in the system. As the Supreme Court said in *Swann* at page 24, "The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

I concur in the result for the reasons set forth herein.

Josephine GOSS et al.
v.
BOARD OF EDUCATION, CITY OF KNOXVILLE.
Civ. A. No. 3984.

United States District Court
E. D. Tennessee, N. D.
June 7, 1967.

School desegregation case. The District Court, Robert L. Taylor, Chief Judge, held, inter alia, that rule authorizing superintendent of schools to continue enrollment of students in their present schools until completion of grade requirement for such schools, providing that such is consistent with sound administration, was valid where evidence showed that such rule was not used to promote racial segregation, and that school board policy permitting younger children to transfer to schools out of their zone of residence where an older brother or sister was attending was valid where proof showed that such rule was not operated to promote racial segregation but was for benefit of parents and students.

Order in accordance with opinion.

1. Schools and School Districts ⇐154
Rule authorizing superintendent of schools to continue enrollment of students in their present schools until completion of grade requirement for such schools, providing that such is consistent with sound administration, was valid where evidence showed that such rule was not used to promote racial segregation. U.S.C.A.Const. Amend. 14.

2. Schools and School Districts ⇐154
School board policy permitting younger children to transfer to schools out of their zone of residence where an older brother or sister was attending was valid where proof showed that such rule was not operated to promote racial segregation but was for benefit of parents and students. U.S.C.A.Const. Amend. 14.

3. Schools and School Districts ⇐155
A class action brought by students and parents precludes consideration of school personnel other than faculty.

4. Schools and School Districts ⇐13
Neighborhood school system is not objectionable on constitutional grounds in absence of a showing that such a system is being used to deprive a student of his constitutional rights.

5. Schools and School Districts ⇐154
No constitutional duty exists on part of school board to bus Negro or white children out of their neighborhoods or to transfer classes for sole purpose of alleviating racial inbalance which school board did not cause, nor is there any duty to select new school sites solely in furtherance of such purpose.

6. Schools and School Districts ⇐154
School district offends no constitutional requirements when it grants to all students uniformly an unrestricted freedom of choice, regardless of zoning, as to schools attended so that each pupil in effect assigns himself to school he wishes to attend.

7. Schools and School Districts ⇐13
Drawing of school lines is a discretionary function of school board, but when challenged the burden of proof is on school board to demonstrate that school lines of each school were not drawn with a view to preserve a maximum amount of segregation.

8. Schools and School Districts ⇐13
Evidence in school desegregation case required conclusion that there was no intentional gerrymandering of school lines by school board in order to promote racial segregation.

9. Courts ⇐262.4(9)
Court has no right to inject itself into supervision of state schools unless there is a clear disregard of a plaintiff's constitutional rights.

Carl A. Cowan, Knoxville, Tenn., Z. Alexander Looby, Avon N. Williams, Jr.,

Nashville, Tenn., Jack Greenberg, New York City, for plaintiff.

S. Frank Fowler, Knoxville, Tenn., for defendants.

MEMORANDUM

ROBERT L. TAYLOR, Chief Judge.

This case has had a long history. Seventeen students attending school in the Knoxville preparatory and school systems, joined by their parents or guardians, filed suit on December 11, 1959 against the Board of Education of the City of Knoxville, the Members of the School Board, Superintendent of Schools, and a number of principals of schools, seeking: an injunction against the defendant from refusing to admit or transfer them to the respective schools which they had sought to enter and which they were prevented from entering because they were members of the Negro race; an order declaring the policy and practices of defendants to be unconstitutional, in excluding plaintiffs and other persons similarly situated from the elementary or secondary schools of Knoxville because of their race pursuant to Article II, Section 12 of the Constitution of Tennessee, Section 49–3701, 49–3702 and 49–3703 of the Tennessee Code; an injunction prohibiting the defendants from engaging in any other actions that limit or affect admission to the Knoxville schools of the infant plaintiffs, or any Negro children similarly situated under defendants' jurisdiction; and, an order requiring the defendants to present to the Court a complete plan designed to bring about good faith compliance with the decision of the Supreme Court of the United States in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L. Ed. 873, at the earliest practicable date throughout the public school system of the City of Knoxville and of Knox County which shall provide for a prompt and reasonable start towards desegregation of the public schools of said City and a systematic and effective method for achieving such desegregation, with all deliberate speed.

Following the answer of the defendants to the complaint, a hearing was had on February 8, 1960. An order was entered on that date by the Court directing the School Board to submit on or before April 8, 1960 a plan to bring about a good faith compliance with the decision in Brown v. Board of Education, supra. On April 8, 1960, the Board of Education complied with that order, and submitted a plan of desegregation called Plan 9.[1]

1. "1. Effective with the beginning of the 1960–61 school year racial segregation in Grade One of the Knoxville Public Schools is discontinued.

2. Effective for 1961–62 school year racial segregation shall be discontinued in Grade Two and thereafter in the next higher Grade at the beginning of each successive school year until the Desegregation Plan is effected in all twelve grades.

3. Each student entering a desegregated grade in the Knoxville Public Schools will be permitted to attend the school designated for the Zone in which he or she legally resides, subject to regulations that may be necessary in particular instances.

4. A plan of school zoning or districting based upon the location and capacity (size) of school buildings and the latest enrollment studies without reference to race will be established for the administration of the first grade and other grades as hereafter desegregated.

5. Requests for transfer of students in desegregated grades from the school of their Zone to another school will be given full consideration and will be granted when made in writing by parents or guardians or those acting in the position of parents, when good cause therefor is shown and then transfer is practicable, consistent with sound school administration.

6. The following will be regarded as some of the valid conditions to support requests for transfer:

a. When a white student would otherwise be required to attend a school previously serving colored students only;

b. When a colored student would otherwise be required to attend a school previously serving white students only;

c. When a student would otherwise be required to attend a school where the majority of students of that school or in his or her grade are of a different race."

Plaintiffs objected to the plan upon a number of grounds, the main one being that it did not provide for elimination of racial segregation as required by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

An extended evidentiary hearing was held on the objections to the plan on August 8, 9, 10, 11 and 12, 1960. On August 19, the Court filed a detailed memorandum approving the plan, with the single exception of the provision relating to technical and vocational courses offered in the Fulton High School to which Negro children would not have access, and directed the Board to submit a plan which would give the Negro students who desired technical and vocational courses an opportunity to take them. (186 F.Supp. 559).

On September 2, 1960, plaintiffs filed a motion for a new trial and for appropriate relief from the operation of the judgment entered on August 26, 1960 pursuant to the memorandum opinion. On September 6, 1960 the Court entered an order denying the motion. An appeal was taken by plaintiffs following the denial of a new trial.

While the appeal was pending, defendants filed a plan to provide vocational and technical training for Negro students similar to those provided for white students at Fulton High School.[2]

Defendants also filed a statement entitled "Transfer Policy—Vocational Division—Knoxville City Schools—'Procedures.'"[3]

2. "1. Continue present general policy of providing vocational facilities at Austin High School and at Fulton High School when it is shown that fifteen or more properly qualified students are interested in the training.

2. When a course cannot be established at either Austin High School or Fulton High School because of lack of a sufficient number of qualified students, and the course is already available at the other school, the student or students may request and obtain transfer upon the terms as set out in the transfer policy now in effect in the Knoxville City Schools for vocational students, same being a part of this plan.

3. When a vocational facility is not already available at either Austin High School or Fulton High School, but a sufficient number of qualified students are available through a combination of students from the two schools, the new facility may be established at either school.

4. Factors to be used in deciding whether or not a new course is established.

(a) Number of qualified students as determined by Bulletin No. 1—"Administration of Vocational Education," Federal Security Agency, Office of Education. These are:

1. The desire of the applicant for the vocational training offered;
2. His probable ability to benefit by the instruction given; and
3. His chances of securing employment in the occupation after he has secured the training, or his need for training in the occupation in which he is already employed.'

(Enrollment in vocational classes is limited to students who have reached their fourteenth birthday.)

(b) Availability of space to take care of the maximum as provided by the State Board of Vocational Education.

(c) Cost as determined by the Board of Education based upon availability of funds.

5. In the continued promotion of the vocational program in the Knoxville City Schools, the Board of Education will follow the rules and regulations as set forth from time to time by the State Board for Vocational Education.

6. The principals of the schools involved, the Director of Vocational Education, and the Superintendent acting on behalf of the Board of Education will be responsible for carrying out this plan consistent with sound school administration and without regard to race.

7. This plan is to become effective at the beginning of the school year, September, 1961."

3. "1. The student must indicate an interest in taking a vocational course.

2. The student fills out Form #235 in triplicate at least four weeks before the end of a school semester. (Copy of Form #235 is attached and made a part of this plan.)

3. The principal is responsible for seeing that at least one standardized voca-

The Sixth Circuit Court of Appeals in affirming this Court's judgment in some respects and in modifying it in others (301 F.2d 164), stated at page 168:

"In conclusion, we affirm the judgment of the District Court in the following respects: the approval of the plan insofar as it pertains to school grades already integrated; the approval of the plan as to items three and four thereof, providing for zoning or districting based upon location and capacity of school buildings and the permission of students to attend schools designated for their zones; the approval of the plan as to transfers subject to it being used for proper school administration purposes and not for perpetuation of segregation; the rejection of the plan so far as it pertains to Fulton High School and the order to the board to resubmit a plan in a reasonable time that will permit Negro students to have the advantage of the special courses of that high school and the denial of injunctive relief.

"We modify the judgment of the District Court insofar as it approved the board's plan for continued segregation of all grades not reached by its grade-a-year plan. It is not the function of this Court to formulate or dictate to the board a plan for the operation of the Knoxville schools. It is, likewise, not our intention to require immediate total desegregation. We do believe, however, that more grades than contemplated by the board's plan should now be desegregated. In the light of the board's experience with the present plan, it should be enabled to submit an amended plan that will accelerate desegregation and more nearly comply with the mandate of the Supreme Court for 'good faith compliance at the earliest practicable date.'

"The case is remanded to the District Court with instructions to require the board to promptly submit an amended and realistic plan for the acceleration of desegregation, in accordance with the views herein expressed."

tional aptitude test is given the student and that the results are recorded on Form #235.

4. Parents will be furnished a description of the vocational courses. A copy of Form #235 (the transferring document) must be approved by the parents. A statement that the student transferring intends to remain in the new school for a period of at least one school semester, contingent upon the student being able to profit by the course offered, must also be approved by the parents.

5. If the parent signs Form #235 approving the transfer, the principal will review the application, confer with the attendance worker and either approve or disapprove the transfer, writing into the record his reason, or reasons, for disapproval.

6. The student is required to fill out Form #206 (the official Enrollment Card), omitting only the schedule section of said card. (Copy of Form #206 is attached and made a part of this plan.)

7. Forms #206 and #235, along with the students cumulative card shall be sent to the Attendance Department for endorsement.

8. Forms #206 and #235, along with the student's cumulative card, will then be forwarded to the receiving principal.

9. The principal of the receiving school, after reviewing the student's record, either accepts or rejects the transfer, setting out in writing the reason or reasons, for rejection.

10. An appeal from the decision of the sending principal or of the receiving principal may be made to the Superintendent by the student requesting the transfer. An appeal from the decision of the Superintendent may be made to the Board of Education. Said appeal to the Superintendent shall be filed in writing with the Superintendent within four weeks after the student has received notice of the decision of the principal from which the appeal is taken. The appeal from the Superintendent's decision must be filed in writing with the secretary of the Board of Education within two weeks after the student receives notice of the Superintendent's decision.

11. No student will be accepted at either Austin High School or Fulton High School without following the above transfer procedure. (The requirement in Item #2 above shall not apply to a new student who becomes a legal resident of the City of Knoxville after deadline referred to in said item.)"

Plaintiffs' petition for certiorari was granted and this case was heard by the Supreme Court on March 20, 21, 1963 along with a case from Davidson County involving a similar question, and was decided by it on June 3, 1963. (373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632). In the *Goss* case, the Supreme Court considered only Section 6 of the plan, which was the transfer section (supra, Footnote 1). This Section the Supreme Court held invalid because it promoted racial discrimination. It observed that transfers are available to those who choose to attend school where their race is in the majority, but that there was no provision whereby a student might transfer upon request to a school in which his race was in the minority, unless he qualified for a good cause transfer. The Court further observed:

> "This is not to say that appropriate transfer provisions, upon the parents' request, consistent with sound school administration and not based upon any state-imposed racial conditions, would fail. Likewise, we would have a different case here if the transfer provisions were unrestricted, allowing transfers to or from any school regardless of the race of the majority therein. But no official transfer plan or provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment." pp. 688, 689, 83 S.Ct. p. 1409.

The Board submitted a plan for Fulton Vocational High School on March 31, 1961 and an evidentiary hearing was held by this Court thereon. The Court in a memorandum opinion rendered on June 19, 1961 approved the plan with the single reservation that: "A student who lives near Fulton and who possesses the necessary vocational qualifications to enter Fulton should not be required to travel across town to attend Austin when Fulton is much nearer."

Plaintiffs' second appeal involving the Fulton School was decided by the Court of Appeals on July 6, 1962 (305 F.2d 523), in which this Court was affirmed in approving the plan except insofar as it pertained to the transfer procedures. The case was remanded by the appellate court with instructions to require an amendment that would permit all students to transfer as a matter of right when they qualified for the courses which they desired to take in one of the two high schools involved (Fulton and Austin), and such course was not available to them in the school they were attending.

On June 18, 1962 plaintiffs filed a motion to require defendants to file immediately a supplemental plan for accelerating desegregation of the City Schools of Knoxville as of the beginning of the 1962–63 academic school year, in accordance with the mandate of the Court of Appeals for the Sixth Circuit filed in this Court on June 8, 1962.

On June 25, 1962 the Board stepped up the integration schedule so as to include the fourth grade, as well as the third, effective September 1, 1962.

Plaintiffs filed objections to the amended plan and urged in support a number of grounds and requested that the case be advanced on the docket for an immediate hearing on the objections.

On March 14, 1963 the plan was further amended so as to desegregate the fifth and sixth grades, effective with the school year 1963–64. Objections were filed to this plan. The Board desegregated the summer junior and senior daytime high schools to be held at Tyson Junior High School and West High School beginning June, 1963 so that anyone could attend these schools on the basis of his or her record and qualifications, without regard to ra[illegible].

The hearing was held on the amendments to the plan on April 1, 1963 and this Court held that desegregation of the fifth and sixth grades complied with the mandate of the Court of Appeals. The Board was ordered to file an amended plan with respect to the Fulton High School showing that it had complied with the mandate. The Board was directed to make schools available to all retarded children.

The Board submitted a plan on May 15, 1963 regarding Austin and Fulton High Schools, and regarding schools for retarded children.

On February 28, 1964, the Sixth Circuit Court of Appeals entered the following order on what appears to have been plaintiffs' third appeal:

"Upon the statement of the attorney for the defendants-appellees to the effect that the Board of Education of the City of Knoxville, Tennessee has decided to file by June 5, 1964 a plan to eliminate all racially discriminatory practices in all grades, programs and facilities of the Knoxville Public School System not later than the time that regular school sessions begin in September, 1964, the appeal is dismissed and the case remanded for further proceedings in the District Court effectuating said decision."

Following this order, this Court directed the Board to file by June 5, 1964 a plan as proposed by it in the hearing before the Court of Appeals, which plan would be effective by the time the regular school sessions began in September, 1964.

On May 11, the Board filed a plan adopted on May 11, 1964 providing for complete desegregation of the public schools of Knoxville. Plaintiffs objected to this plan on June 11, 1964 upon the ground that it did not meet the requirements of the Fourteenth Amendment to the Federal Constitution and urged in support of its objections six separate grounds.

The Court advised counsel on more than one occasion that it desired a hearing on these objections. Counsel advised the Court that they felt all matters would be settled between the plaintiffs and the School Board except the provision of the plan relating to transfers, and that there was a possibility of agreement on this provision.

But on January 21, defendants moved for a pre-trial conference. Such conference was held on February 5, 1965 and an order entered pursuant thereto on February 12, 1965, approved by the attorneys for the respective parties. Paragraphs 1 and 5 of the plan were amended and Paragraph 6 was added. The amended plan for complete desegregation was filed on February 16, 1965, as follows:

"1. Effective with the beginning of the school year in September, 1964, all racially discriminatory practices in all grades, programs and facilities of the Knoxville Public School System shall be eliminated and abolished. Without limiting the generality and effectiveness of the foregoing, all teachers, principals and other school personnel shall be employed by defendants and assigned or re-assigned to schools on the basis of educational need and other academic considerations, and without regard to race or color of the persons to be assigned, and without regard to the race or color of the children attending the particular school or class within a school to which the person is to be assigned. No transfer or re-transfer of a teacher, principal or other school personnel may be granted or required for considerations based upon race and color and no assignment or re-assignment of such teacher, principal or other school personnel may be made for considerations based upon race or color.

"All tenure and seniority rights are to be observed and the defendants will not utilize or attempt to utilize the provisions of the State Teacher Tenure Law or any other law, custom or regulation conferring discretion upon them in the employment and discharge of teachers or the abolition of teaching positions in such manner as to discriminate either directly or indirectly on account of race or color in the employment, discharge, re-employment, assignment, or re-assignment of teachers, principals or other school personnel in the Knoxville City School System.

"2. Each student will be assigned to the school designated for the district in which he or she legally resides,

subject to variations due to overcrowding and other transfers for cause.

"3. A plan of school districting based upon the location and capacity (size) of school buildings and the latest enrollment studies will be followed subject to modifications from time to time as required.

"4. Requests for transfer of students from the school of their district to another school will be given full consideration and will be granted when made in writing by parents or guardians or those acting in the position of parents, when good cause therefor is shown and when transfer is practicable, consistent with sound school administration.

"5. Students may request transfer to or enrollment in any vocational or technical facility sponsored by the Knoxville City Board of Education and will be accepted subject to requirements respecting aptitude, ability, pretraining, physical condition, age, and other considerations including adequacy of facilities.

"6. The Board of Education recognizes the continuation of jurisdiction of the United States District Court for the Eastern District of Tennessee, Northern Division, at Knoxville of this Board and the matters involved in this plan, until termination of said jurisdiction by express direction of said court."

Plaintiffs filed objections to Paragraphs 2, 3 and 4 of this plan on February 23, 1965.

On July 28, 1965 a pre-trial conference was held on the plan and an order entered pursuant thereto on July 30, 1965. Paragraph 3 of the February 16, 1965 plan, as amended by statement of the Board on April 19, 1965, was stricken and the following transfer plan substituted:

"Upon written application, students may be permitted to transfer to schools outside their assigned attendance zones only in exceptional cases for objective administrative reasons and no transfer shall be granted, denied or required because of race or color."

The plan was further amended by striking Paragraph 4 and substituting the following provision relating to transfers:

"All applications of students for transfers to schools outside their assigned attendance zones shall be considered, and approved by the Superintendent of Schools at his discretion, pursuant to recommendation of the Director of the Department of Child Personnel after due investigation and consideration of the Department of Child Personnel."

The Board was ordered to file the plan in a single document and to publicize the provisions of the plan of desegregation as modified so that pupils and parents would be more fully informed. The order further recited that:

"The Plaintiffs' last Specifications of Objections to said Plan of Desegregation, in Paragraph 1 thereof, attacked upon constitutional grounds paragraph 1 of the statement of the Board of Education of April 19, 1965, in which the Board of Education set out a Plan for permissive continued enrollment of pupils in the year 1965–66 and thereafter in the schools attended in the previous year. This remains as an unresolved issue in this case. The Court informed Counsel that a trial on that issue may be had on August 3, 1965, but Counsel for the Plaintiffs stated that it would be impossible for Plaintiffs to prepare for trial upon such short notice, and that Plaintiffs wish to preserve their right of attack upon said provision of the Plan. The trial of this issue is deferred to such time as the Court can find an open date; and in the meantime the defendants are fully authorized to follow the Plan of Desegregation as presented relative to the school year 1965–66, but giving effect to the modifications ordered above."

Thus, as shown by the foregoing order which was approved by the attorneys for the respective parties, the unresolved is-

sue in the case was the validity of the Board's action, as set out in the plan, "for permissive continued enrollment of pupils in the year 1965–66 and thereafter in the schools attended in the previous year."

A detailed statement of the plan was filed in conformity with the order of July 30, 1965 on August 6, 1965.[4]

The Court called the case for hearing at its regular December, 1965 term of court and at its regular May, 1966 term, but was advised that there was only one issue to be resolved and that the parties felt there was a possibility of resolving this issue and that they desired more time. At the joint suggestion of the parties, the case was not set for trial on the merits at either of these terms of court.

Plaintiffs filed an amendment to their objections to the amended plan for complete segregation on January 19, 1966, in which they objected to the brother-sister transfer provision.

During the sounding of the December, 1966 docket, the one issue, that involving the brother-sister transfer provision, not having been resolved, the Court set the case for trial on the merits for March

4. "1. Effective with the beginning of the school year in September, 1964, all racially discriminatory practices in all grades, programs and facilities of the Knoxville Public School System shall be eliminated and abolished. Without limiting the generality and effectiveness of the foregoing, all teachers, principals and other school personnel shall be employed by defendants and assigned or re-assigned to schools on the basis of educational need and other academic considerations, and without regard to race or color of the persons to be assigned, and without regard to the race or color of the children attending the particular school or class within a school to which the person is to be assigned. No transfer or re-transfer of a teacher, principal or other school personnel may be granted or required for considerations based upon race and color and no assignment or re-assignment of such teacher, principal or other school personnel may be made for considerations based upon race or color.

"All tenure and seniority rights are to be observed and the defendants will not utilize or attempt to utilize the provisions of the State Teacher Tenure Law or any other law, custom or regulation conferring discretion upon them in the employment and discharge of teachers or the abolition of teaching positions in such manner as to discriminate either directly or indirectly on account of race or color in the employment, discharge, re-employment, assignment, or re-assignment of teachers, principals or other school personnel in the Knoxville City School System.

"2. Each student will be assigned to the school designated for the district in which he or she legally resides, subject to variations due to overcrowding and other transfers for cause, and the Superintendent may permit continued enrollment of students in their present schools until completion of the grade requirements for said school, provided this is consistent with sound school administrative policy.

"3. A plan of school districting based upon the location and capacity (size) of school buildings and the latest enrollment studies will be followed subject to modifications from time to time as required. (Zone maps and typed statements of Zone boundaries were filed in this case April 27, 1965.)

"4. Upon written application, students may be permitted to transfer to schools outside their assigned attendance zones only in exceptional cases for objective administrative reasons and no transfers shall be granted, denied or required because of race or color. All applications of students for transfers to schools outside their assigned attendance zones shall be considered and approved by the Superintendent of Schools pursuant to recommendation of the Director of the Department of Child Personnel after due investigation and consideration of the Department of Child Personnel.

"5. Students may request transfer to or enrollment in any vocational or technical facility sponsored by the Knoxville City Board of Education and will be accepted subject to requirements respecting aptitude, ability, pre-training, physical condition, age, and other considerations including adequacy of facilities.

"6. The Board of Education recognizes the continuation of jurisdiction of the United States District Court for the Eastern District of Tennessee, Northern Division, at Knoxville of this Board and the matters involved in this plan, until termination of said jurisdiction by express direction of said court."

31, 1967. At the instance of counsel, the case was continued until May 11, 1967. In the meantime, another pre-trial was held on March 10, 1967 and an order entered pursuant thereto.

Plaintiffs contend in their theories as set forth in the pre-trial order that the provision giving the children who were presently enrolled in schools an option to remain in those schools until they completed their grade requirements promoted segregation.

The rule that permitted the younger brother or sister of a child to enroll in the school where the older member attended was objected to for the same reason. Plaintiffs stated that a hearing should be held on the question whether the plan had in its operation been effective in eliminating discrimination in the school system in compliance with the constitutional requirement.

It is the theory of the defendants, as set forth in the pretrial order, that where a pupil becomes a student in a particular school, as for instance a junior high school, the interests of his education are promoted by permitting him to retain whatever outside activity places he has obtained, by remaining in that school even though he resides in a different zone from that of the school he attends.

Defendants further contended that the brother-sister provision should be retained because of transportation problems involved with families having children attending different schools and other conveniences to the families and students. Defendants contended that the plan as a whole has been effective in its operation in the elimination of discrimination in the school system and that it complies with constitutional requirements.

The three issues set forth in the pretrial order were:

(1) Whether the grade requirement provision, enabling students to continue in their present school until graduation, complied with the Fourteenth Amendment.

(2) Whether the rule permitting children of the same family to transfer to and attend schools out of their zones of residence where a brother or sister might be otherwise required to attend different schools, violates the Fourteenth Amendment.

(3) Whether the operation of the plan complied with the Fourteenth Amendment in relation to Issues 1 and 2.

Plaintiffs submitted a modification to the pre-trial order on March 10, in which they requested that Issue No. 3 be deleted and the following inserted:

"(3) Whether or not the Knoxville Public School System is effectively desegregated in compliance with the Fourteenth Amendment to the Constitution of the United States in relation to 1) Pupil Assignment, 2) Faculty, 3) Administrative Staff and Clerks, 4) Principal Clerks, 5) Maintenance and Operation Personnel, 6) School Programming, 7) Organization and Curriculum, 8) Extra-Curricula Activities, 9) Facilities and New Construction and 10) School Boundaries or Zone Lines."

The Court denied the request as it related to the matters numbered 3 to 10 unless plaintiffs furnished citations of authority pointing out cases in which the courts had dealt with such matters.

Plaintiffs excepted to the pre-trial order as modified on March 27, 1967 and on May 1, 1967 submitted a statement of the cases relied upon in conformity with the modified pre-trial order.

Plaintiffs' motion to further modify the amended pre-trial of March 10, as modified on March 15, was denied.

On May 8, plaintiffs filed a 7½ page motion entitled "Motion for Further Relief." It is largely a repetition of the motion and objections and exceptions previously filed, except that it stated the defendants had planned and were planning the construction of new schools and school facilities in such manner and locations that would adhere to and increase segregated racial residential patterns and would maintain and perpetuate racial segregation and that defendants had drawn and continued to maintain and

enforce school boundaries or zone lines which are gerrymandered according to race and which disregarded sound principles of school administration relating to school capacity.

Plaintiffs asked that the Board: provide a system that would effect an equitable distribution of Negro and white faculty and staff members in each school and provide a plan of employment of supervisory and professional staff, administrative staff, clerks, maintenance and operation personnel, in such a manner that the racial segregation, exclusion and discrimination, which plaintiffs claim now exists, be disestablished and that there be equitable distribution of Negro employees; provide a plan of programming, organization and extra-curricular activities designed to disestablish all existing racial and socio-economic segregation and discrimination in the system; and establish a plan of new school construction which shall be based not upon racial or socio-economic residential patterns, but which shall be based upon, and provide for both the present and future, an equitable distribution of racial and socio-economic elements in the population of each school in the school system.

A full evidentiary hearing was held in which the parties were permitted to introduce proof relating to all the issues set forth in the pre-trial order of March 10, as modified by order of March 15. A comparatively large record was made consisting of hundreds of pages of exhibits, including maps, charts, documents pertaining to transfers, school building surveys, annual statistical reports of the Superintendent, insurance reports, desegregation of teaching personnel, classification of students, school expansion programs, etc.

One of the attorneys for the plaintiffs, in his argument, stated that there were two questions for the determination of the Court, namely, whether the grade requirement rule and the brother-sister rule that permitted some students to attend school out of the zone in which they lived, met constitutional requirements and whether the plan which has been in effect with some modifications since the 1960–61 school year, which started out with what is known as the stair-step desegregation, namely, a grade-a-year plan, and ripened into a plan of full desegregation beginning in the school year 1964–65, is operated so as to perpetuate segregation in violation of the Fourteenth Amendment to the Constitution of the United States.

Completion of Grade Requirement

This rule became effective for the school year 1965–66 and will expire by its own terms within three years from that date. Transfers under this plan amount to around six per cent of the entire student body of 37,220 students. The rule authorizes the Superintendent of Schools to continue enrollment of students in their present schools until completion of the grade requirement for said schools, providing this is consistent with sound administration. Those who testified on the subject stated that this was a rule that was very important in the administration of the schools. If the rule were changed, it would reduce the number of Negroes attending white schools according to Dr. Bedell. The Negroes have been permitted to go to the school of their choice. The rule has not been used to promote segregation. It is not mandatory, but operates only upon the student's application. A student who is forced to leave the school he first chooses would sacrifice the beneficial association that he has made with his classmates, and would sever his connection with extra-curricular activities in which he has participated in that school such as football, basketball or baseball, Glee Club, dramatic club or band activity, or other valuable relationships which he has made.

A like provision was approved by the Court in the case of Monroe v. Board of Commissioners of City of Jackson, Miss., 221 F.Supp. 968 (1963), and approved again in the same case at 244 F.Supp. 353 (July 30, 1965).

[1] The preponderance of the evidence shows, and the Court finds, that

this provision of the plan is not used to promote segregation and is, therefore, valid.

* School Board Policy Adopted August 23, 1965, Permitting Younger Children to Transfer to Schools Out of Their Zone of Residence Where an Older Brother or Sister is Attending

The School Board adopted a resolution on August 23, 1965 which permitted a younger child to go out of his zone of residence to attend his older brother or sister's school.

This rule was made at the time of the City's annexation which brought into the City Limits the Rocky Hill School. At that time, older members of the family who lived in the Rocky Hill zone were attending school in Bearden. Under the zone requirement, the younger members would have been required to go to Rocky Hill. This would have presented a transportation inconvenience and expense for the parents in forcing them to take their children to two different schools. The Board was advised by counsel that there was no racial implication in allowing all members of the family to attend the same school. This prompted the Board to pass a resolution reciting that it was the policy of the Board that the younger child be placed in the same school where an older one was. Defendants conceded that if this rule were carried out to promote segregation it would be invalid.

A similar mandatory rule was condemned in Ross v. Dyer, 312 F.2d 191 (C.A.5). In that case it was used to perpetuate segregation and was rightfully condemned.

[2] This Court can visualize instances in which both economic hardship and serious inconvenience would result if the younger child were not permitted to attend the same school which their older brothers and sisters attend. The proof shows that if this provision is eliminated, it will promote desegregation in some instances and in some instances it will not. The proof further shows that it is not operated to promote segregation but is operated for the benefit of the parents and students. The transfers under this provision involved around one percent of the students only.

This brings us to a third issue, namely, whether the Board has operated the plan as modified to promote segregation in violation of the Fourteenth Amendment.

The items which plaintiffs raised under this issue were many. They contended that the zone lines were made to promote segregation. These lines were in the plans that were approved by this Court and were reviewed by the Sixth Circuit on at least two appeals and presumably were either not attacked or were impliedly approved by the Supreme Court of the United States when it considered and remanded the case to the Court of Appeals by holding that the transfer plan involving the minority-majority rule was unconstitutional. This day is late for making a claim that the zones are unconstitutional because they promote segregation.

The Knoxville School System is known as the neighborhood system. The neighborhood school has been approved by various courts, including our own Circuit.

The great and convincing preponderance of the proof shows that the zones were not made to promote segregation. The effect of the testimony of Dr. Osborne was that the zones were not intentionally gerrymandered, but that in many instances they promoted segregation.

Doctor Adams stated that the zone lines were designed to fill school buildings. The population is moving from the interior of the town and towards the suburbs. This factor was taken into consideration in planning the new school buildings at Bearden and Fountain City. The University of Tennessee is now making a study of the Knoxville School program and school plans. Dr. Adams stated: that the school structure in Knoxville was more complicated than in many other places; that one of its purposes was to desegregate teachers and that they were desegregating teachers; that they were also pushing desegrega-

tion of staff as fast as possible within reason; that it was the Board's policy to hire people on account of ability and competency; that equal opportunity for occupational jobs is given proper consideration although he has not had an opportunity to do much about it in the past two years because of dollar restrictions; and that the intra school activities are desegregated.

[3] It was held in the case of Mapp v. Board of Education of City of Chattanooga, Tennessee, 319 F.2d 571 at 576 (C.A. 6), that school personnel other than teachers and principals cannot be considered in a class action brought by students. The Court referred the case back to the District Court to consider faculty desegregation only. See Bradley v. School Board of City of Richmond, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187. The present suit is a class action brought by students and parents and precludes consideration of school personnel other than faculty.

[4] The neighborhood school system, if used to discriminate against Negroes, has been held to be unconstitutional. E. G., Norwood v. Tucker, 287 F.2d 798 (C.A. 8); Northcross v. Board of Education of City of Memphis, Tenn., 302 F.2d 818 (C.A. 6); Green v. School Board of City of Roanoke, Virginia, 304 F.2d 118 (C.A. 4); Dodson v. School Board of City of Charlottesville, 289 F.2d 439 (C.A. 4). On the other hand, these same cases recognize the principle that in the absence of a showing that such school systems are being used to deprive a student of his constitutional rights, they are not objectionable on constitutional grounds. Downs v. Board of Education of Kansas City, 336 F.2d 988, 995 (C.A. 10).

Some of the facts in *Downs* are similar to those found here. In that case, there was a racial imbalance in the public schools of Kansas City, where there was a total of 7,467 Negro children in the elementary, junior high and senior high schools. Almost 73 per cent of these children, or 5,405, attended the nine schools which were predominantly Negro. The remaining 27 per cent, or 2,062, attended 26 integrated schools. The schools located nearest to the concentration of Negro population had the highest percentage of Negro pupils and the schools the farthest away from that concentration were composed entirely of white students. Thus, while there were some schools having an all Negro student body and some having an all white student body, there were also 26 of the Kansas City schools which had both Negro and white students. The superintendent of schools testified that the school attendance districts were laid out without regard to race and upon the basis of geography, school capacity and number of children residing in the district.

The Court held that there was no basis in fact for the appellants' contention that the evidence established "a clear pattern of deliberate use of zone lines and assignment regulations to insure the continued operation of a dual school system." All of the evidence was to the contrary and the trial court so found, saying that the boundary lines after 1954 were set on the basis of building location and after population studies indicated the predictable pupil loads which the various buildings could accommodate. The Court further held that the drawing of school zone lines was a discretionary function of a school board and would be reviewed only to determine whether the school board acted arbitrarily.

The Court observed that it was true that the staffs of the various schools were either all white, as is the case in white and integrated schools, or all Negro. But, the appellants did not, by their complaint or evidence, seek to have the staffs desegregated. Furthermore, they did not cite and the Court did not find any case holding that such a policy, in and of itself, was sufficient to establish a discriminatory intent on the part of the Board.

The Court further observed that none of the factors relied upon by appellants, when considered alone, was sufficient to establish a denial of their constitutional

right not to be discriminated against because of race or color; that the crucial question was whether all of those factors considered together were sufficient to establish such a denial.

The Court held that there was no evidence of intentional gerrymandering of the school attendance districts, no intentional use of a dual school system, no assignment of pupils according to racial factors nor any other schemes or devices condemned in the cases. It was concluded that the Kansas City school system met the "minimal requirements for nonracial schools" or "geographic zoning, according to the capacity and facilities of the buildings and admission to a school according to residence as a matter of right."

Appellants also contended in the *Downs* case that even though the Board may not have been pursuing a policy of intentional segregation, there was still segregation in fact in the school system and under the principles of Brown v. Board of Education, the Board had the positive and affirmative duty to eliminate segregation in fact as well as segregation by intention. The Court observed that while there seemed to be some authority to support that contention, the better rule was that although the Fourteenth Amendmen prohibits segregation, it does not command integration of the races in the public schools, and that Negro children had no constitutional right to have white children attend school with them. The Court concluded by saying that the question was conclusively answered in Bell v. School City of Gary, Indiana, 324 F.2d 209, 218 (C.A. 7) where the court held that "there is no affirmative U.S. Constitutional duty to change innocently arrived at school attendance districts by the mere fact that shifts in population either increase or decrease the percentage of either Negro or white pupils." It concluded that the decision in *Brown* and the many cases following it, would not require a school board to destroy or abandon a school system developed on the neighborhood school plan, even though it resulted in a racial imbalance of the students within the schools, where the districts in the school system had been honestly and conscientiously arrived at with no intention or purpose of maintaining or perpetuating segregation. Downs v. Board of Education of Kansas City, supra, 336 F.2d 994–998.

Returning again to our case, Doctor Osborne testified for plaintiffs that some of the zone lines perpetuated segregation because housing projects, economic status and possibly other factors caused Negroes to locate in neighborhoods confined to their own race. He put much stress on the Coleman report in his testimony. He made it clear that he did not intend to convey the idea that the School Board and school officials had prepared the zone lines for the purpose, and with the intent, of promoting segregation.

Doctor Bedell testified for defendants that the zone lines were inaugurated in 1963 and that the schools were located as near to children as possible to avoid the hazards of transportation. He further stated that Negroes had been permitted to attend the schools of their choice.

The Court finds that in 1965, three small Negro schools were closed; that in 1961, eight schools were desegregated with 30 Negro students attending eight formerly white schools; that in 1962, 21 Negroes were attending desegregated schools; in 1962–63, 84; in 1964, 13 formerly white schools were attended by 253 Negro children; in 1964–65, 29 formerly white schools were attended by 717 Negro children; in 1965–66, 1195 and that in the seventh month of the school year 1967, 31 formerly white schools were attended by 1783 Negroes.

It finds that in the school year 1960–61, the Knoxville School System had 41 schools—23 were all Caucasian, 10 all Negro and 8 integrated. In the first school year after annexation, 1963–64, the system had a total of 68 schools—43 all Caucasian, 12 all Negro, and 13 integrated. In the school year 1964–65, the number of integrated schools increased to 29, in the next school year of 1965–66 it increased to 33, and the num-

ber increased to 38 in the school year 1966–67. The number of all Caucasian schools dropped from 43 in 1963–64 to 21 in the current school year. The number of all-Negro schools dropped from 12 in 1963–64 to 5 in 1966–67.

It further finds that the total student enrollment in 1966–67 is 37,220 students, of which 5,615 are Negroes, or about 15 per cent of the total enrollment. Of these 5,615 Negroes, there are 4,641 or 82.6 per cent, of the Negro children in attendance at a school in which there is at least one Caucasian child.

It finds that in the school year 1963–64, all of the twelve grades were desegregated. All schools above the seventh grade have Negroes; that despite concentration of Negro residences, including large Federal housing centers, in the school year 1966–67 32 per cent of the Negro students in the Knoxville Public School System, amounting to 1,743 in number, attended schools in which white students either predominated or were in equal balance with Negro students, and in each such instance there was a substantial number of Negroes so that the benefits of educational integration were favorably presented for the students of both races. These schools and the number of Negroes in attendance were Bearden—63, Beaumont—35, Belle Morris—50, Brownlow—24, Cedar Grove—30, Fair Garden—291, Lincoln Park—21, Lonsdale—13, Moses—31, Park Lowry—338, Pond Gap—13, Ridgedale—31, Smithwood—37, Bearden High—32, Christenberry Junior High School—20, East High School—350, Fulton High School—62, Park Junior High School—104, Rule Junior High School—157, West High School—41.

It finds that staff integration began in 1965–66 with 11 schools having integrated staffs. In 1966–67, 35 of 64 schools, or 54.6 per cent of the schools, had integrated staffs. There is no Negro principal in a white school and no white principal in a Negro school. The schools were developed under the community concept and the zone lines followed community patterns. There are 29 Negro teachers assigned to white schools and 10 white teachers assigned to Negro schools.

The Court finds that after a slow start, the Board of Education and School Administration have moved with commendable zeal, conscientiousness and results toward the integration of the schools and faculties in an enormously complex situation. Knoxville is a town divided geographically on the south by a river with only three bridges across it, by a system of ridges on the north with a limited number of transportation routes therethrough, and by railroad systems quartering the town north and south, east and west, with multiple, hazardous grade crossings. The complexity has been heightened by the tendency of Negroes to live in two large, well-defined areas in the town rather than dispersed over it, by large urban renewal programs which displace portions of the population resulting in wholesale and unpredictable removals to other areas of the town, by the annexation of a large area of the County, since the beginning of this suit, whose students and schools have had to be absorbed into the City School System, by heavy increases in population necessitating a building program with crucial decisions as to building sites in the light of the geographical barriers and other factors involving population concentration and movements.

The Court finds that the above considerations are further complicated by serious budgetary limitations and fiscal complications, and by the fact that the Negro population itself constitutes but 15% of the whole, a fact, when figures alone are used, which tends to obscure what is actually a vigorous, straight-forward and expertly managed program of integration.

[5] The Court is of the opinion that there is no constitutional duty on the part of the school board to bus Negro or white children out of their neighborhoods or to transfer classes for the sole purpose of alleviating racial imbalance which it did not cause, nor is there a duty to select new school sites solely in

furtherance of such purpose. Deal v. Cincinnati Board of Education, 369 F.2d 55, 61 (C.A. 6); Gilliam v. School Board of City of Hopewell, 345 F.2d 325 (C.A. 4).

"In dealing with the multitude of local situations that must be considered and the even greater number of individual students involved, we believe it is the wiser course to allow for the flexibility, imagination and creativity of local school boards in providing for equal opportunity in education for all students. It would be a mistake for the courts to read Brown in such a way as to impose one particular concept of educational administration as the only permissible method of insuring equality consistent with sound educational practice. We are of the view that there may be a variety of permissible means to the goal of equal opportunity, and that room for reasonable men of good will to solve these complex community problems must be preserved * * *"

* * * * * *

"Moreover, our refusal to restrict the school board with a mathematically certain formula for the vindication of individual constitutional rights is not an innovation. The right to a trial by an impartial, fairly selected jury, is well established in our law and it has been protected against the same sort of disguised racial discrimination that has been attempted in the school desegregation cases. * * *"

* * * * * *

"Appellants' right to relief depends on a showing of more than mere statistical imbalance in the Cincinnati schools. They must also expose that added quantum of discriminatory state action which deprives them of their constitutional right to freedom of choice. If the school officials, through overt practice or by subterfuge, have treated students differently solely because of race, then they not only must cease doing so, but also must take affirmative action to remedy the condition which they have caused. Thus, even if the Negro students were distributed uniformly in the schools, if other forms of discrimination were used against them they would still be entitled to the aid of the law. When no discrimination is shown, racial imbalance alone is no warrant for relief." Deal v. Cincinnati Board of Education, supra, 369 F.2d pp. 61, 62, 63.

See Downs v. Board of Education, supra; Bell v. School City of Gary, Indiana, supra, and Springfield School Committee v. Barksdale, 348 F.2d 261, 264 (C.A. 1).

The district judge's denial of a preliminary injunction enjoining further construction of new elementary schools in the Cleveland school system was affirmed. Craggett v. Board of Education of Cleveland, 338 F.2d 941 (C.A. 6).

[6] The Court is of the opinion that a school district offends no constitutional requirements when it grants to all students uniformly an unrestricted freedom of choice (regardless of zoning) as to schools attended so that each pupil in effect assigns himself to the school he wishes to attend. Bradley v. School Board of City of Richmond, Va., 345 F.2d 310 (C.A. 4); Wheeler v. Durham City Board of Education, 346 F.2d 768 (C.A. 4); Goss v. Board of Education, 373 U.S. 683, 688–689, 83 S.Ct. 1405, 10 L.Ed.2d 632; Northcross v. Board of Education of City of Memphis, 333 F.2d 661, 665 (C.A. 6).

[7, 8] The drawing of zone lines is a discretionary function of the school board. Where challenged, the burden of proof is on the school board to demonstrate that zone lines of each school were not drawn with a view to preserve a maximum amount of segregation. Northcross v. Board of Education of City of Memphis, supra, 665. The Board has met the burden and one of plaintiffs' witnesses conceded there was no intentional gerrymandering.

[9] The Court stated infra in Olson v. Board of Education that the point to be recognized in a case where all other educational factors are equal, is that the Board's action is based upon expert opin-

ion. The test for arbitrariness in relation to additional policies of New York is not necessarily the same as the test for arbitrariness in determining whether there has been a violation of the Fourteenth Amendment. The Court has no right to inject itself into the supervision of state schools unless there is a clear disregard of plaintiff's constitutional rights. Olson v. Board of Education of Union Free School District No. 12, Malverne, N.Y., 250 F.Supp. 1000, 1009–1010 (D.C.).

A definition of "desegregation" is contained in the Civil Rights Act of 1964, and is as follows:

"§ 2000c. *Definitions*

"As used in this subchapter—

* * * * * *

"(b) 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance." 42 U.S.C. § 2000c.

Plaintiffs rely upon the recent cases of Kelley v. Altheimer, Arkansas Public School District No. 22, 378 F.2d 483 (C.A. 8); United States v. Jefferson County Board of Education, 372 F.2d 836 (C.A. 5). These cases may be differentiated on the facts from the case under consideration here. Moreover, we are bound by the holdings in our own Circuit.

The principles laid down in the case of Deal v. Cincinnati Board of Education, supra, are applicable to our case.

Since the Knoxville School System is desegregated under the plan which has been in operation since the school year 1963–64 and since the preponderance of the evidence shows that the plan is not being operated to deprive Negro students of their constitutional rights and that Negro school teachers are not being discriminated against because of their race, it is, therefore, ORDERED that the various objections to the plan be, and same hereby are, denied and the motion for an injunction enjoining proposed school buildings in the Bearden and Fountain City area be, and same hereby is, denied.

This is not a case in which attorneys' fees are permissible. Fleischmann Distilling Corporation v. Maier Brewing Co. et al., opinion by Chief Justice Warren, decided May 8, 1967, and found in 87 S.Ct. 1404.

This case having been in this Court since 1959 and the Court being of the opinion as outlined above that the Board and school authorities are moving skilfully and with expedition toward the full integration of the Knoxville School System, that there is no further need for the schools to operate under Court supervision, it is further ordered that the case be stricken from the docket.

TURNER CONSTRUCTION COMPANY, Plaintiff,

v.

UNITED STATES of America, Defendant.

Civ. No. 135-257.

United States District Court S. D. New York.

April 16, 1964.

Action by plaintiff taxpayer to recover paid income tax deficiencies on three separate and distinct claims for refund. The District Court, Levet, J., held, inter alia, that taxpayer's exchange of its stock in corporation, formed to complete construction project, for a non-negotiable contingent note of corporation, amounting to a fictitious sale, was not a "closed transaction" for income tax purposes, where at time of receipt of note job was not completed, claims were undetermined and taxpayers could pos-

Josephine GOSS et al.
v.
BOARD OF EDUCATION, CITY OF KNOXVILLE, TENNESSEE, et al.
Civ. A. No. 3984.

United States District Court,
E. D. Tennessee, N. D.
July 1, 1970.

School desegregation case. The District Court, Robert L. Taylor, J., held that neighborhood schools do not violate Fourteenth Amendment. The Court also held that evidence established that the defendant school board was operating a unitary school system.

Motion for injunction denied.

1. Schools and School Districts ⇐13
"Unitary school system" is one within which no person is to be effectively excluded from any school because of race or color.

See publication Words and Phrases for other judicial constructions and definitions.

2. Constitutional Law ⇐220
Neighborhood schools do not violate Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

3. Schools and School Districts ⇐154
Board of education did not have affirmative duty to change school zones to increase racial mixing of students.

4. Schools and School Districts ⇐154
Fact that one school had capacity of 1,200 students but was attended by 1,364 students and another school with capacity of 750 was attended by 361 students indicated violation by board of education of its stated policy of drawing school zone lines to conform to capacity of existing school structures and board must revise zones in area for succeeding school term to eliminate overcrowding at the first school and to utilize existing capacity at the second.

5. Schools and School Districts ⇐71
Use of portable classrooms as temporary expedient in neighborhoods which were so overcrowded that construction of additional school facilities was projected by board of education was decision within board's administrative expertise.

6. Constitutional Law ⇐220
Evidence did not establish that portable classrooms, which were used as temporary expedient in neighborhoods which were so overcrowded that construction of additional school facilities was projected by board of education, had been used in violation of rights of Negro pupils under the Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

7. Schools and School Districts ⇐13
Evidence did not establish that feeder system on which junior and senior high schools depended for enrollment did not promote desegregation.

8. Schools and School Districts ⇐13
Evidence established that board of education was fulfilling its duty in integration of teachers in school system, in school desegregation case.

9. Schools and School Districts ⇐141(1)
Choice of teacher does not have much weight in area of assignment of teachers to achieve integration of faculties.

10. Schools and School Districts ⇐133, 141(1)
Evidence in desegregation case was insufficient to support charges of discrimination in hiring and discharge of teachers or principals or assignment of principals.

11. Schools and School Districts ⇐141(1)
In consideration of magnitude of duties of principals of public schools, board of education should have considerable latitude in assigning them.

12. Schools and School Districts ⇐13
Evidence in desegregation case established that schools had not been built to perpetuate a dual system and that

board of education had established and followed building principles consistent with neighborhood school system which had previously been approved by court.

13. Schools and School Districts ⇐13

Evidence established that defendant school board was operating a unitary school system in desegregation case.

Carl A. Cowan, Knoxville, Tenn., Avon N. Williams, Jr., Nashville, Tenn., Jack Greenberg, New York City, for plaintiffs.

S. Frank Fowler, Knoxville, Tenn., for defendants.

MEMORANDUM

ROBERT L. TAYLOR, District Judge.

[1] Plaintiffs seek to dismantle the Knoxville school system and to substitute therefor what they refer to as a unitary system. A unitary school system is one "within which no person is to be effectively excluded from any school because of race or color." Alexander v. Board of Education, 396 U.S. 19, 20, 90 S.Ct. 29, 30, 24 L.Ed.2d 19; Northcross v. Board of Education, 397 U.S. 232, 237, 90 S.Ct. 891, 25 L.Ed.2d 246 (1970), (concurring opinion).

This litigation has a long history.[1] In its present posture, the suit involves a motion by plaintiffs filed November 17, 1969, shortly after the decision in Alexander v. Board of Education, supra, for immediate relief. Preliminary proceedings[2] resulted in an order limiting proof on the merits to specifically alleged discriminatory developments since the last decision in the suit on June 7, 1967. These developments concerned the alleged gerrymandering of neighborhood school zone, faculty employment policies, and the policies governing the location of new educational facilities.[3]

When this suit was instituted on December 11, 1959, the Board of Education had maintained de jure segregation in the schools since 1870. After the mandate in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), the Board had considered some eight plans of integration, without judicial proceedings, but none was adopted. The 1959 plan proposed to the Court was a grade-a-year-plan. One feature of Plan 9 was:

> "4. A plan of school zoning or districting based upon the location and capacity (size) of school buildings and the latest enrollment studies without reference to race will be established for the administration of the first grade and other grades as hereafter desegregated."

These zones were discussed in the Court's 1960 memorandum.

> "In implementation of the Plan filed on April 8, 1960, the Superintendent testified that he instructed his Staff to begin work on a zoning map which was approved at a meeting of the Board on August 6, 1960, just two days before the hearings began. He testified that he instructed his Staff that in the preparation of the map there would be no maneuvering or gerrymandering, that the rezoning and re-establishing of school zones must be based on enrollment studies and on the size and capacity of the buildings. The work was in charge of

1. The report at 270 F.Supp. 903 (D.C. 1967) traces the history of the suit and the history of desegregation in the schools. Memorandums styled Goss v. Board of Education are also reported at 186 F.Supp. 559 (D.C.1960); 301 F.2d 164 (6 Cir. 1962), 305 F.2d 523 (6 Cir. 1962), 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632 (1963) and 408 F.2d 1183 (6 Cir. 1969).

2. A hearing on December 12, 1969 was postponed due to a commitment of plaintiffs' counsel. Defendant filed a motion to dismiss January 30, 1970. All motions were heard on March 16, 1970, and an order entered April 3, 1970 limited the scope of the proof on the merits.

3. Proof was heard April 21, 1970, and the parties were ultimately granted 50 days to file briefs.

Mr. Frank Marable, Supervisor of Child Personnel, whose duty it is to check on attendance, school zones and the movement of people.

"On cross-examination, he testified that in preparing the map, efforts were made through the pre-school round-up program and estimates of principals to get estimates of the number of children that would be affected. This zoning plan was confined to the elementary schools and did not include the secondary schools.

"Under detailed cross-examination, Mr. Johnston pointed out that small groups or pockets of Negro homes were scattered throughout the Knoxville City School System in contrast to major concentrations of Negro citizens; that the zone boundaries were often dictated by artificial barriers like heavily traveled streets and also by the size and capacities of school buildings.

* * * * * *

"He testified categorically that no member of his Staff in working on the map had ever operated deliberately to cut out Negro children; and that they tried to work the thing out on a fair basis, depending on the size of the building, shifting population and enrollment."

On appeal the zones were approved by the Court of Appeals, 301 F.2d 164 (6 Cir. 1962), and the Supreme Court did not grant certiorari on this issue. 371 U.S. 811, 83 S.Ct. 38, 9 L.Ed.2d 53 (1962).

In 1967, this Court stated:

"This brings us to a third issue, namely, whether the Board has operated the plan as modified to promote segregation in violation of the Fourteenth Amendment.

"The items which plaintiffs raised under this issue were many. They contended that the zone lines were made to promote segregation. These lines were in the plans that were approved by this Court and were reviewed by the Sixth Circuit on at least two appeals and presumably were either not attacked or were impliedly approved by the Supreme Court of the United States when it considered and remanded the case to the Court of Appeals by holding that the transfer plan involving the minority-majority rule was unconstitutional. This day is late for making a claim that the zones are unconstitutional because they promote segregation.

"The Knoxville School System is known as the neighborhood system. The neighborhood school has been approved by various courts, including our own Circuit.

"The great and convincing preponderance of the proof shows that the zones were not made to promote segregation. The effect of the testimony of Dr. Osborne was that the zones were not intentionally gerrymandered, but that in many instances they promoted segregation.

"Doctor Adams stated that the zone lines were designed to fill school buildings * * *"

The evidence presented at past hearings showed, and the Court finds, that there was no gerrymandering of the zones before 1967. The Board has continued to use the same criteria in establishing zones since 1967. In answers to interrogatories, it stated:

"The major criteria used in drawing up boundaries for school zones [are]:

"(1) Capacity of existing school structure;

"(2) Existing safety hazards in immediate area;

"(3) Physical proximity of students to the school (neighborhood school)."

The Board admitted that zones were reviewed annually and that changes had been made since 1967. Consequently, the Court heard proof to determine if the Board had continued to follow its approved policy.

Doctor Fred Bedelle, Jr., the Assistant Superintendent in Charge of Personnel

and Development, was the defendant's only witness. An employee of the defendant since 1963, he recruits and assigns teachers and is in charge of pupil services and assignments. Initially, he explained changes in the elementary schools.[4] There was a one block change in the Chilhowee zone in 1967 when a new road was opened. This had no effect on the racial composition of the school in 1967. Chilhowee had 721 white students in 1967. In 1969, 640 white and 42 Negro students attended that school.

In 1967, adjustments were made in the Belle Morris, Brownlow and McCallie zones. Land condemnation for Interstate 40 had eliminated some residential housing, and the changes compensated for classroom vacancies. Dr. Bedelle testified that some 80 pupils were involved and that there was some change in the racial composition of the schools involved because the housing in these areas was integrated.

The Beaumont zone was moved one block north on the north side to eliminate overcrowding at Lonsdale, the adjacent zone, and to avoid traffic hazard from an access route to I-75.

In South Knoxville a change in the high school pupil assignment was responsible for some elementary school shifting in 1968. Certain students from Young High, a city school with grades 9-12, were shifted to Doyle High, a newly constructed county school. Some Young students were shifted to South High. To utilize vacant space at Young, it was changed into a 7-12 grade school. Grammar schools in the area which were formerly 1-8 were converted into 1-6 systems. Three and four block adjustments in the Galbraith, Giffin and Flenniken zones were made to balance classroom capabilities. The grammar school zone changes involved less than 75 students and had no effect on the racial composition of the student bodies because the schools, reflecting residential housing, are almost exclusively attended by white children. In 1969, eight of the 1018 children who attended these schools were Negro. Similarly, the changes in Young High had no effect upon the racial composition of the student bodies involved.

Doctor Bedelle stated that all elementary school zoning changes involved between 200-250 students and had "very little effect" upon the racial mixture of those schools.

As the previous discussion concerning Young High implies, there were more significant changes in secondary school zones. The opening of new schools was mainly responsible for the changes. Northwest Junior High (7-9) opened in the Fall of 1968. Ridgedale, Pleasant Ridge, West Haven, and Norwood were changed from 1-8 into 1-6 systems. Seventh and eighth grade students from those schools, some ninth graders who had attended Central High, and some county students formerly assigned to Powell High made up the Northwest student body. In 1969, two of the 999 students were Negro. The student body reflects the composition of the residential housing in the area. Zone changes did not affect integration.

Bearden Senior High (10-12) opened in the Fall of 1969. The Former Bearden campus had contained a 1-8 and a 9-12 system. The former campus was changed into a K-6 and a 7-9 system. Cedar Grove and West Hills Elementary were changed from 1-8 into 1-6. Those seventh and eighth graders were assigned to Bearden Junior High. The Bearden zone was contracted and straightened on the north and east sides. These zone adjustments and the opening of the new Bearden school relieved pressure caused by overcrowding at all these

4. Apparently, Knoxville schools are organized or are being organized into a 6-3-3 system, but significant deviations exist. Although the Court recalls no testimony on the issue, defendant asserts, and the interrogatories support that assertion, that before the 1963 annexation city schools were in a 6-3-3 grade system. Annexed county schools used the 8-4 system. The 8-4 schools are being phased out as new schools are built.

schools and allowed removal of some temporary classrooms. There was no effect on racial composition of schools in the involved zones since changes were made in areas involving near exclusive white residential patterns.

A slight change was made in the West High zone on the west side to adjust the zone for irregularities created by the old city boundary of Knoxville.[5] West changed from a 9–12 to 10–12 in 1968 when Northwest Junior High was opened. In 1967, 1968 and 1969, 39, 26 and 32 Negroes, respectively, attended West.

There was a 1967 adjustment of the zone between Whittle Springs Junior High and Park Junior High. The Park zone was increased on the north to include areas that were formerly in the Whittle Springs zone. Dr. Bedelle explained that the change relieved overcrowding at Whittle Springs and added students at Park where existing facilities were not being fully utilized. There is no numerical evidence before the Court of the racial composition of these two schools in 1966 before the change occurred.

Austin High was the Negro high school under de jure segregation. Currently Austin offers extensive vocational courses while academic courses for this area are taught at East High. In 1968, zone lines between the two schools were abolished. The particular curriculum chosen by the student determines where he attends. There are shuttle buses for necessary class interchanges. In 1967, before abolishing the zone lines, Austin (10–12) was attended by one white and 442 Negroes; East (9–12) had 294 whites and 342 Negroes. In 1969, ten whites and 739 Negroes attended the combined schools.

On cross-examination, plaintiffs vigorously attempted to develop the idea that not changing the boundary lines would also produce gerrymandering. Under this theory, evidence was heard which attacked the validity of zones approved in the past and most of the other facets of pupil assignments. Special emphasis was given to Rule High and the feeder schools in that area. Rule is a 7–12 system with a 1200 capacity. In 1967, 1264 whites and 142 Negroes (206 overcapacity) attended there; in 1968, 1172 whites and 173 Negroes (145 overcapacity) attended; and in 1969, 1120 whites and 244 Negroes (164 overcapacity) attended. Nearby, Beardsley Junior has grades 7–10 and a 750 capacity. It is the only school in Knoxville with this grade structure. In 1967 of 498 pupils, 11 were white; in 1968 four of 416 were white; and in 1969 four of 361 were white. Plaintiffs contend that failure to adjust these zones lines to fill the Beardsley vacancies shows that the present lines perpetuate segregation. Dr. Bedelle stated that there had been staff studies of the area, but that he was not sure what recommendations had been made. He stated that 6–8 portable classrooms would be necessary for Beardsley to accommodate all of the students in 7–9 grades in this area. He did not state what impact this change would have on Rule.

Doctor Bedelle testified that the Board had not considered pairing any schools. Plaintiffs pointed out from data taken from interrogatories that if existing racial patterns were maintained, pairing would produce an almost equal number of white and Negro students in certain schools. Lonsdale and Sam E. Hill are two of the schools plaintiffs mentioned. These schools are not far apart and have grades 1–6. Lonsdale has a capacity of 560 and 48 of the 423 students are Negroes. Sam E. Hill, a former all-black school, has a capacity of 540 and four of the 351 students are white. West View and Cansler are similar but defendant maintains that the railroad and major traffic artery dividing the section makes pairing dangerous.

Plaintiffs also contend that the Park Junior and Vine Junior zones tend to promote segregation because Magnolia

5. In 1963, Knoxville annexed considerable adjacent property.

Street, the four-lane highway that divides the two zones, has a black residential pattern to the south and a white pattern to the north. In 1969 of 633 students at Vine, five were white. At Park 235 were white and 274 were Negroes. In this connection, Dr. Bedelle stated, in effect, that the mixing or non-mixing of races was not the most important factor in locating a zone's boundary. In this particular instance he felt that locating the boundary line on this major traffic artery was consistent with all the past experience of the Board.

Plaintiffs' proof, in addition to the interrogatories, consisted of testimony of Dr. John H. Croghan, an Assistant Professor of Education at The University of Miami. His principal classroom duties consist of instructing potential principals in administration. Many of his duties as a professor involve the establishment and implementation of school integration plans.[6] The Court understands he has authored or participated in drawing plans involving 17 Florida counties. The Defense Fund [7] employed him to testify in Knoxville. In answering a series of questions eliciting his familiarity with the Knoxville schools, he stated that he had studied defendant's responses to the interrogatories for three days. The hearing was the occasion for his third trip, each of two days duration, to Knoxville. In attempting "to get a feel of the school system" he had examined one-half of the school buildings, at least to the extent of driving past them in an automobile. He had talked with one member of the Board and with other assistant superintendents, principals, teachers, guidance counselors, and community leaders, especially in the black community.

In defining the terms he used, he stated that "effective desegregation" existed when no school could be racially identified by the composition of the students or faculty. In other words, since 16% of the students under defendant's control are Negroes, then 16% of each student body should be composed of Negroes. Under this definition there is no effective desegregation in the Knoxville schools. Dr. Croghan introduced Exhibit 12 which shows that 83% of the Negro students in Knoxville attend schools that have student bodies composed of over 50% Negroes. Almost seventy-eight percent of the Negro teachers teach at schools where over 50% of the student body are Negro.

Doctor Croghan made general observations about the Board's policy. On gerrymandering, he expressed surprise over the Board's failure to maintain a "pupil locator map." The Court understands that such a map would fix all the residences in Knoxville and show the race, number and age of pupils residing therein. Without such a map the witness stated that definite conclusions about gerrymandering were difficult to make. There are possible changes in zones which will alter existing racial composition at schools. For example, boundary lines for the Austin-East feeder schools could be redrawn.

Other factors which would also change the racial composition but leave it short of the desired 16% were mentioned. If certain elementary feeder schools were changed, racial composition at secondary schools would change. One hundred eleven of the 122 portable and temporary classrooms used by defendant were located at schools where the student body was generally white. Dr. Croghan felt that expanding capacity at these schools while leaving existing capacity at some predominately Negro schools under-utilized, showed an intent by the Board to perpetuate segregation. His

6. The federal government pays one-half of Dr. Croghan's salary. He is a "Title IV" employee under subchapter IV of the 1964 Civil Rights Act dealing with "Public Education." 42 U.S.C. § 2000c et seq.

7. See N.A.A.C.P. v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) for organizational heirarcy.

remedy was to enlarge the zones at schools with available space. In this respect, he also mentioned that the grade structure at Beardsley (7–10) was forced in order to hamper integration. It was his further opinion that the existence of special course offerings at various schools promoted segregation. He was especially critical of the variation in curriculum at Fulton High (1,213 white—115 Negro—1969) and Austin-East (10 whites—739 Negro—1969), the vocational schools that defendant operates.

The trust of all of plaintiffs' contentions is that if any school in the system can be identified by race, then a dual system exists. Applied to Knoxville, it is asserted that this situation can be remedied by assigning 84% white students and 16% black students at all schools. In a closely related proposition, plaintiffs assert that the goal of all the Board's actions in the pupil assignment area should be to mix more students racially. Specifically, plaintiffs say that failure to establish zone lines that would achieve a higher percentage of racial mixing is improper. Plaintiffs contend that portable classrooms are used at predominately white schools to absorb student overloads instead of adjusting zones to assign these students at predominately black schools where the necessary facilities exist. Plaintiffs also contend that the Board should pair schools to achieve more racial mixing; that the transfer system is unconstitutional especially with the demonstrated result at Austin-East; and that the feeder school system is operated in a discriminatory way to prevent or retard racial mixing. (None of the last four contentions was made in the initial motion for immediate relief.)

The Board's position is that it was maintaining a consitutitionally acceptable policy in 1967 when this Court approved its policy and that it has continued its operations under that plan which was later affirmed by the Circuit Court. It denies assigning any students to perpetuate segregation.

In approving the Board's plans in 1967, this Court dismissed the suit because it was of the opinion that the schools in Knoxville were racially desegregated. Plaintiffs have urged in these proceedings that the effect of later decisions, especially *Alexander*, supra, is that if any school is racially identifiable, then the system is not desegregated. There appear to be racially identifiable schools under the Board's control due to the housing patterns of the neighborhoods.

[2] Fundamental to the legal questions raised by the recited facts is the constitutionality of neighborhood schools. Plaintiffs' overriding contention is that the neighborhood schools violate the Fourteenth Amendment. In the opinion of the Court, neighborhood schools are constitutionally sound. The *Brown* mandate, supra, as applied by this Court in 1967, Goss v. Board of Education, 270 F.Supp. 903, and as modified by the 1968 school cases, Green v. County School Board of New Kent County, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed. 2d 716; Raney v. Board of Education of Gould School District, 391 U.S. 443, 88 S.Ct. 1697, 20 L.Ed.2d 727; Monroe v. Board of Commissioners of City of Jackson, 391 U.S. 450, 88 S.Ct. 1700, 20 L. Ed.2d 733, and *Alexander*, supra, in 1969, and *Northcross*, supra, in 1970, has not abolished the neighborhood school. See *Northcross*, supra, especially the concurring opinion of Mr. Chief Justice Burger. The Sixth Circuit approved of neighborhood schools when it reviewed this case in 1969, Goss v. Board of Education, 406 F.2d 1183, and has more recently reiterated its position in a case dealing with the Cincinnati schools. Deal v. Cincinnati Board of Education, 419 F.2d 1387 (December 9, 1969). That opinion, which this Court must follow, stated:

"In our opinion in the first appeal, we said:

"'The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration. This is so

> because it is acknowledged to have several valuable aspects which are an aid to education, such as minimization of safety hazards to children in reaching school, economy of cost in reducing transportation needs, ease of pupil placement and administration through the use of neutral, easily determined standards, and better home-school communication.' (369 F.2d [55] at 60)
>
> "Appellants contend that housing patterns in Cincinnati are segregated as a result of actions of both public and private agencies, and that the School Board 'may not close its eyes to this reality' but should remedy it. We are not told how or by what lawful authority the School Board can remedy the housing patterns of a neighborhood. Perhaps what appellants want is for the Court to order the Board to provide buses to transport children to other school districts where they do not reside, construct additional schools in such other districts where necessary to accomplish this purpose, and abandon the existing neighborhood schools. We find no basis to enter any such order.
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> • • • • • •
>
> "Boards of Education can hardly be blamed or held responsible for neighborhood residential patterns.
>
> "In our opinion, the burden of righting wrongs alleged to have been committed by public or private agencies ought not to be foisted upon Boards of Education, which have enough problems of their own to solve in providing proper education for the young. Nor should such burden be saddled upon the owners of real property who are taxed in Ohio to provide funds for the operation of public schools • • •" 419 F.2d pp. 1391, 1392

[3] There is no evidence in the record that the Board has made changes for racial reasons. The contention that the Board has an affirmative duty to change the zones to increase racial mixing is not well founded.

[4] In a related area plaintiffs spend considerable time developing the facts about the Rule and Beardsley areas. The Court finds that in the areas served by Rule and Beardsley the Board has not acted in accord with its stated policy of drawing zone lines to conform to the capacity of existing school structures. In 1969, the 1200 capacity Rule School was attended by 1364 students. Beardsley with a 750 capacity was attended by 361 students. The Board has asserted in supplemental proposed findings of fact that the calculations found in the answers to interrogatories concerning school capacity were mechanically determined by multiplying the number of classrooms by the number of students who can utilize a typical classroom. Since all classrooms are not uniform, it is asserted that the given school capacities may be erroneous. The Court accepts this contention to a limited degree because there was no allegation concerning classroom utilization and the Board was not prepared to present other than general data on the subject. Acceptance of the Board's contention does not entirely explain the disparity in these zones which has sharpened since 1967. Accordingly, the Board is directed to revise the zones in this area for the 1970 school term to eliminate overcrowding at Rule and to utilize existing capacity at Beardsley. This revision may or may not continue the present grade structure at Beardsley.

In view of the foregoing direction, during its annual revision of zone lines, the Board may wish to pay considerable attention to the 1,000 capacity Holston High where attendance has increased from 1,093 in 1967 to 1,289 in 1969.

[5, 6] The controversy concerning the use of portable classrooms was developed at trial. There was no allegation of their use to perpetuate segregation and the Board offered no proof on the subject except for the statistical data supplied in answers to interrogatories.

The Court understands that portables are used as a temporary expedient in neighborhoods which are so overcrowded that construction of additional facilities is projected by the Board. For instance, the Board reacted to the westward population shift by constructing Bearden Senior High. In the interim period "portables" were used. At the Bearden complex, West Hills, and Norwood, 32, 26 and 19 portable classrooms were used respectively in 1967, 1968, and 1969. In 1969, the Board used a total of 48 portable classrooms. The Court observes that the zones where portables were used were not contiguous to zones with unusual unutilized capacity. Exhibits before the Court show capacity which is assumed to be the maximum capacity as opposed to the optimum capacity. Exhibits also show some unutilized space at many of the schools in the system. The use of portable classrooms is a decision within the Board's administrative expertise, and the evidence does not show that "portables" were used in violation of plaintiffs' rights under the Fourteenth Amendment.

[7] The Board asserts that the junior and senior high schools depend upon a feeder system for enrollment. Plaintiffs say that the feeder system does not promote desegregation.[8] The evidence is insufficient to support this contention.

The transfer policy has been the subject of much controversy during prior litigation. The Board presently allows transfers for the following reasons:

1. Continued enrollment of students in their present schools until completion of the grade requirements of said school.
2. Hardship imposed upon parent(s) and/or child.
3. Availability of vocational offering approved for the student.
4. Educational program level (accelerated, average, slow learners, SMR) as recommended by the Assistant Superintendent for Instruction.
5. Capacity of the school plant or availability of classroom space.
6. Medical or physical handicap.
7. Emotional difficulty in adjusting to a specific school situation.
8. Administrative reassignment due to disciplinary action.

Plaintiffs have asserted that this policy is used to perpetuate segregation in the Knoxville schools. Pointing to the facts concerning the Austin-East zone, plaintiffs say that the Board has allowed informal transfers at will. From the facts recited in the Order of May 12, 1970, it appears that there is some irregularity in the administration of that policy. Transfer irregularities were not alleged, and the defendant did not submit evidence of the number of students who attend schools out of zone and the reasons therefor. Plaintiffs asked for this information in their initial interrogatories, and the Board has never supplied an answer. Parenthetically, the Court was not aware of this fact when it ruled upon post-trial objections to interrogatories seeking similar information. In light of the former history of this suit the Board has committed a grave omission in failing to either enforce its transfer policy or to maintain records to show that enforcement. Failure to provide the requested information is difficult to excuse. Approval of neighborhood zones is specious when informal transfers occur. For this reason the Board is ordered to keep adequate records to show enforcement of its

8. In examining proposed findings submitted by the parties, the Court sees that some confusion has developed on this point. Beardsley Junior High is cited as an example of a bad feeder system. Exhibit IX answering Interrogatory 18 omitted the feeder systems for Beardsley and Bearden Junior Highs. Map exhibits show that Rocky Hill and West Hills feed into Bearden. Beardsley is fed by Cansler, Maynard, and Moses Schools.

transfer plan and to allow plaintiffs to inspect such records at reasonable times.

Plaintiffs alleged that the Board had continued segregation and racial discrimination in the assignment, hiring and discharge of principals and faculty. Exhibit IV to interrogatory 9 shows that the Board employs nine Negro and 59 white principals.[9] Dr. Bedelle explained that his staff was responsible for the screening of principal applications. Among other things a state certification is necessary for qualification. He expressed his opinion that any competent principal regardless of race could administer an integrated school. After the preliminary screening the Board, an elected body, actually selected the principals. Dr. Bedelle did not know what motivated their choice. In this connection, it was shown that the Board's membership had been enlarged from five to nine in 1969 and that a Negro lady was a member of the Board.

Doctor Bedelle testified that no principal had been transferred solely for racial reasons. In 1969, a Negro replaced a white principal at Park Junior High (274 Negroes—234 whites—1969). During the consolidation of Austin and East, the Negro principal at Austin became coordinator of federal projects. A younger white principal was transferred from Christenberry Junior High to head the combined schools.

In 1969, the Board employed 1429 white and 229 Negro teachers. Thirteen percent of the 1969 teachers were Negroes while 16% of the students were Negroes. Dr. Bedelle stated that integrated faculties were beneficial. While he testified that the Board was making a concerted effort to hire qualified Negro teachers, only four of the 39 new teachers hired in 1969 were Negroes. In explanation he stated that the Board had received a disproportionate number of qualified applicants from prospective white teachers.

Assignments of teachers are closely related to hiring. Teachers are hired with the intent to put them in specific vacancies. Vacancies may arise when a teacher leaves the system, requests reassignment (transfer) or when a school is expanded to require a new teacher. Vacancies are filled to achieve a biracial mix in a school's faculty, but no assignments were made solely for this purpose. Many factors are significant in assignments. A teacher's request for assignment or reassignment is granted when possible to maintain employee morale. A conflicting policy is the Board's desire to retain teachers at the same school, especially at elementary schools. The theory behind the policy is that teacher continuity facilitates community interest and aids the parent-teacher relation. It was also pointed out that elementary teachers were easier to assign than secondary school instructors because their job skills were less specialized. In addition to academic qualifications and state licensing requirements, Dr. Bedelle stated that a certain factor, intangible to some extent, guided hiring and assignments. The strengths and weaknesses of various departments of a faculty and personality cohesiveness among existing and potential faculty members are considered. These factors, he felt, explained why there were no transfers solely on account of race. Furthermore,

9. EXH. IV names 68 principals. For statistical purposes the Court has had some difficulty in determining how many schools are controlled by the Board. In an affidavit filed February 17, 1970, attached to a brief, plaintiffs' attorney deposes there are 65 schools. In EXH. I to interrogatory 1, defendant has listed 70 schools. Among these are Elmwood which the Court understands is consolidated with Beaumont and has no principal. Also included among these 70 are Juvenile Home, Knoxville Adult Center, Knoxville Evening High and the State Area Vocational Tech. The Court will treat the system as having 65 schools, eliminating Elmwood (its figures are consolidated with Beaumont). Knoxville Evening High, the Adult Center, the State Area Vocational Tech, and Juvenile Home. Student composition at these schools apparently is not determined by racial considerations.

it was his opinion that a summary transfer solely for racial reasons would adversely affect teacher morale and job performance.

Doctor Croghan was critical of the Board's policy of maintaining consistency in faculties which serve neighborhood schools. Any advantage of faculty continuity in its present character is neutralized by the adverse effect of racial imbalance. A pre-service orientation can condition teachers to work effectively in neighborhoods with which the teachers are unfamiliar. Dr. Croghan had participated in a human relations orientation of this nature which only took three weeks to conduct in Dade County, Florida. In concluding this line of testimony he introduced Exhibits 16 and 17 which show that by reassigning 136 elementary and 116 secondary teachers, defendant's faculties could be balanced in a racial sense, i. e., 13% Negro instructors at all schools.

[8] The Board first integrated its faculties in 1965. The number of integrated staffs has risen steadily; there were 11 in 1965, 35 in 1966, 37 in 1967, 41 in 1968 and 44 in 1969. Plaintiffs contend that black teachers, who are 13% of the teachers employed by the Board, should be assigned to avoid having schools identified by the race of the faculty. Plaintiffs also contend that assigning black principals only at predominately black schools is also improper. In the alternative, plaintiffs say that the present pace of faculty integration is too slow and in reality represents only token integration. The Court finds that since the 1965 decision in Bradley v. School Board of City of Richmond, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187, the Board has made a good faith effort to integrate faculties. Dr. Bedelle, who was in charge of faculty assignments, stated unequivocally that integrated faculties were beneficial. The effect of his testimony was that the Board recognized its duty to integrate, and while not actually ordering a teacher to transfer for racial reasons, encouraged transfers that resulted in faculty integration and exercised some discretion to achieve that result. The Court finds that the Board is fulfilling its duty in the integration of teachers in the Knoxville system. Shifting of professional employees cannot be done like the moving of furniture. In that context, it is observed that 109 of the 252 teachers to be reassigned under plaintiffs' plan to achieve racial equality are black. This movement of almost 50% of the black teachers employed by the Board would result in a very large turnover of suspected disruptive proportions in schools where the percentage of black teachers is great.

[9] In view of *Alexander*, the Court is constrained to find that the Board should accelerate the integration of faculties. At the same time, it is observed that no opinion has clearly defined the extent of this duty. See United States v. Montgomery County Board of Education, 395 U.S. 225, 89 S.Ct. 1670, 23 L.Ed.2d 263 (1969). The Board is reminded that the choice of the teacher does not have much weight in this area. Monroe v. Board of Commissioners, 380 F.2d 955, 960 (C.A.6, 1967). As a further guideline the Board should note the language ordering a school board to "employ, promote, and assign faculty and other personnel 'in furtherance of a goal of removing the former racial identity of a school.'" Monroe v. Board of Commissioners, 427 F.2d 1005 (C.A.6, June 19, 1970).

[10, 11] The Court finds that the evidence is insufficient to support charges of discrimination in the hiring and discharge of teachers or principals. The Court further finds that the Board has not discriminated in the assignment of principals. In consideration of the magnitude of principals' duties, the Board should have considerable latitude in assigning principals. There are no black principals at predominately white schools. A black principal did replace a white principal at Park School (274 black—234 white—1969). A white principal also replaced a black principal at the combined Austin-East School. There is no evidence to show that the

Board abused its discretion in the assignment of principals.

Plaintiffs alleged that the defendant was perpetrating a racially segregated school system by locating new schools or adding to existing schools in residential neighborhoods which were predominately white or black, thereby creating racially identifiable schools. Proof on this issue was limited to schools which were not in the planning or construction stage on June 7, 1967 since a prior decision was made on the same issue adversely to plaintiffs' contention. Goss v. Board of Education, 6 Cir., 406 F.2d 1183, 1186. Answers to interrogatories show that only four schools have been expanded or plans begun for expansion since 1967. New construction at one of those four schools, Bearden Junior High, was limited to the renovation of two shops before the 1969 term. The $31,000.00 cost is considered de minimus. Expenditures had been made on other schools, but these expenditures were considered to be in the form of normal operating costs rather than expanding existing capacity. For instance, "heating corrections" at Park Junior High were completed between 1964 and 1969 at a cost of $43,-800.00.

Planning was begun in September, 1969, to build an elementary school (1–6) with a 600 student capacity in East Knoxville. The location of the school has not been fixed, but the Board has three sites under consideration at present. The Court understands the testimony to be that the location will be east of a North-South line drawn between Fair Garden and Robert Huff schools.

Several reasons were given in support of the proposed locations. Immediately east of the downtown commercial center and north of the Tennessee River, an extensive urban renewal project has been conducted in the past several years. The effected area was in one of the two major localities where Negroes reside in Knoxville. Much residential housing was razed, forcing a population shift. In contrast to white patterns, Negro shifts radiated eastward from the downtown area with Magnolia Avenue being generally maintained as a northern boundary of the Negro community.

This forced population shift has disrupted traditional attendance patterns in nearby neighborhood school zones. For example, Green School (1–6) with a 750 student capacity is now near no residential population center. Attendance tapered from 469 in 1967 (23 white) to 365 in 1968 (8 white) to 281 in 1969 (5 white). Resources at schools in adjacent neighborhood zones have become burdened. So much overcrowding developed at Eastport that the sixth grade was transferred to Green. The remaining 1–5 grades had 442 students in 1969. Eastport's capacity is 452. The East Knoxville situation is further complicated by the physical deterioration of the Mountain View School (1–6). In 1969, 303 Negroes were enrolled in this school which has a capacity of 360. Dr. Bedelle testified that the decision had been made to close Mountain View in the 1970 term and shift these students to Green. Future plans propose closing Robert Huff (1–8) and assigning those students to the new school. In 1969, 307 white and 88 Negroes made up a total student body of 395 at Robert Huff. The capacity for 1969 was 399.

Plaintiffs contend that current population shifts would shortly result in an all Negro school; that the school should be located in an area where long range forecasts indicate stability in white residential patterns, thereby maintaining a racial mixture among the students. Dr. Bedelle expressed hopes that the new school would be equally divided racially, but he did not assure the Court of any definite mixture. He testified that there is a theory among education administrators called the "tipping effect" which posits that once a school is attended by 35% of a minority group, students at the school will shortly become exclusively members of the minority group as the other group flees the area. Dr. Bedelle based his hopes that the "tipping effect" would not be operative

in East Knoxville upon two considerations: completion of the urban renewal project may end violent population shifts; and the Board has proposed construction of a very modern school which may tend to hold whites in the area.

The present Central High is one of the older schools that the Board maintains. It has a 1400 student capacity, and these students are in grades 9–12. Twelve portable classrooms have been used there since 1967. A recent cave-in of a wall has made some ten classrooms inoperable. A new school to be called Central, located approximately ¾ miles from the old plant, was about 65% completed at the date of trial. It will furnish facilities for students in grades 10–12 and have a capacity of 1,500. The present Central High School Building will be used as a junior high school thereby relieving all feeder schools. These feeder schools are on the periphery of the city. Some seven Negroes are anticipated to be in the senior high student body when it begins operations about January, 1971.

The Board had purchased the Agee Building adjacent to West High and remodeling there cost $335,000.00. The answer to interrogatory 12 (EXH. V) recites the project is incomplete. Change will apparently only streamline the present operation of West High and not increase the student capacity.

Plaintiffs also pointed out that Northwest Junior and Bearden Senior Highs were also located on the periphery of the city. Planning for the Bearden School was begun in September, 1966; construction began at Northwest on October 21, 1966. Neither of these schools were included in the April 3 Order. In 1969, Bearden Senior High had 22 Negroes in a student body of 1,035; there were two Negroes in the 999 pupils at Northwest. Residential communities surrounding these schools are almost exclusively white.

Doctor Bedelle was cross-examined at some length about the location of new schools. Schools, he explained, were built where student population exceeded the capacity of existing schools. New construction had recently been on the periphery of the city. There was a very heavy increase in the number of school age children in the newly built suburban neighborhoods in West Knoxville. This fact was also evident, but to a lesser extent, in the older neighborhoods around the new Central High School in Fountain City (North Knoxville). When construction was necessary, schools were located as centrally to the students as possible. One factor complicated the actual pinpointing of a school. While possessing condemnation powers, for economic reasons, the Board sought unimproved land, but sites with twenty to thirty acres (the size of the Bearden Senior High campus) were not always readily available in fast developing residential areas.

Doctor Croghan testified that locating new schools on the city's periphery promoted segregation. If all newly constructed schools are located near the inner city, integration, disregarding transportation cost, will be promoted. One cultural advantage flowing from such a location of schools is the displacement of underprivileged children from inner city schools into schools attended by suburban children. Location of only one of several schools near the inner city, like the proposed grammar school, tends to perpetuate segregation, for anticipated residential housing changes will result in racially distinguishable schools.

[12] The Court is of the opinion and finds that schools have not been built to perpetuate a dual system. The Board has established and followed building principles consistent with the neighborhood school system which this Court approved in 1967.

[13] After examining plaintiffs' contentions in the present case, practically all of which were considered in an exhaustive opinion of June 7, 1967, 270 F.Supp. 903, the Court is of the opinion

and finds that the defendant School Board is operating a unitary school system as defined by the Supreme Court in the case of *Alexander*, supra, and that its motion for immediate relief in the form of an injunction must be denied.

Barbara LANE and Evelyn Costen, as individuals and on behalf of all other persons similarly situated, Plaintiffs,

v.

William McGARRY, individually and in his capacity as Director of the Syracuse Housing Authority, and Syracuse Housing Authority, and Charles Urstadt, Commissioner of the Division of Housing and Community Renewal of New York State, Defendants.

No. 69-CV-484.

United States District Court, N. D. New York.

Sept. 1, 1970.

Action by applicants for low cost public housing for declaration that regulation and resolution of Syracuse Housing Authority which required residence in state for one year immediately prior to application for public housing was unconstitutional. The District Court, Port, J., held that resolution and regulation of Syracuse Housing Authority which required residence in state for one year immediately prior to application for public housing were not unconstitutional as violative of equal protection clause.

Order in accordance with opinion.

1. Constitutional Law ⇐83(1)
Municipal Corporations ⇐717
Syracuse Housing Authority requirement of residence in state for one year immediately prior to application for public housing did not constitute penalty on exercise of applicant's constitutional right to travel from state to state nor unreasonably burden or restrict the movement. U.S.C.A.Const. Amend. 14.

2. Constitutional Law ⇐91
Requirement of Syracuse Housing Authority of residence in state for one year immediately prior to application for public housing did not constitute interference with applicant's rights to freedom of association. U.S.C.A.Const. Amend. 1.

3. Constitutional Law ⇐211
Resolution and regulation of Syracuse Housing Authority which required residence in state for one year immediately prior to application for public housing were not unconstitutional as violative of equal protection clause. Housing Act of 1937, § 1 et seq., 42 U.S.C.A. § 1401 et seq.; U.S.C.A.Const. Amend. 14.

Richard A. Ellison, Syracuse, N. Y., for plaintiffs.

William G. Kennedy, Syracuse, N. Y., for defendants and Syracuse Housing Authority.

Louis J. Lefkowitz, Atty. Gen. of State of New York, Albany, N. Y., for defendant, Charles Urstadt.

PORT, Judge.

Memorandum-Decision and Order

The plaintiffs in the above-entitled action are applicants for low income housing in Syracuse, New York under the jurisdiction of the Syracuse Housing Authority. In their complaint they seek the convention of a three-judge court and a judgment:

1. Declaring the regulations set forth in 9 NYCRR 1627-3.1(a) [1] and § 3.02C2 [2]

1. 9 NYCRR 1627-3.1 provides as follows:
Section 1627-3.1. Eligibility requirements in addition to income limitations.
In addition to income limitations, applicants must also meet following requirements for admission:

2. See note 2 on page 563.

Josephine GOSS et al., Plaintiffs-Appellants,

v.

The BOARD OF EDUCATION OF the CITY OF KNOXVILLE, TENNESSEE, et al., Defendants-Appellees.

No. 20834.

United States Court of Appeals, Sixth Circuit.

June 22, 1971.

Motion Denied June 30, 1971.

See 91 S.Ct. 2293.

Desegregation case. The United States District Court for the Eastern District of Tennessee, Robert L. Taylor, J., 320 F.Supp. 549, with certain exceptions, denied relief sought by plaintiffs' motion for immediate relief, and plaintiffs appealed. The Court of Appeals, O'Sullivan, Senior Circuit Judge, held that where there had not been a history of bitter contesting between city school authorities and court, federal District Court would not be directed to put detailed formula, which was set out by plaintiffs, into effect or to impose rigid timetable for purpose of bringing school system into conformity with direction of United States Supreme Court decisions to effect that neighborhood style of desegregation is not per se constitutional, but case would be remand-

ed to District Court for proceedings consistent with relevant United States Supreme Court decisions.

Remanded.

1. Schools and School Districts ⇐13

Where there had not been history of bitter contesting between city school authorities and court, federal district court would not be directed to put detailed formula, which was set up by plaintiffs in desegregation case, into effect or to impose rigid timetable for purpose of bringing school system into conformity with direction of United States Supreme Court decisions to effect that neighborhood style of desegregation is not per se constitutional, but case would be remanded to district court for proceedings consistent with relevant United States Supreme Court decisions.

2. Schools and School Districts ⇐13

Neighborhood style of desegregation is not per se constitutional.

3. Schools and School Districts ⇐141(1), 15[illegible]

Constitutional prohibition against assigning students or teachers on account of race is applicable only to minority groups.

4. Schools and School Districts ⇐13

Though existence of some all-black or all-white schools will not be struck down per se as intolerable, school authorities must justify continuance of such schools by something more than accident or circumstance of neighborhood.

Norman J. Chachkin, New York City, for plaintiffs-appellants; Carl A. Cowan, Knoxville, Tenn., Avon N. Williams, Jr., Nashville, Tenn., Jack Greenberg, James M. Nabrit, III, Sylvia Drew, New York City, on brief.

Sam F. Fowler, Jr., Knoxville, Tenn., for defendants-appellees.

Before WEICK and MILLER, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

O'SULLIVAN, Senior Circuit Judge.

This case has to do with desegregation of the public schools of Knoxville, Tennessee. The United States District Court in Knoxville, the United States Court of Appeals for the Sixth Circuit and, to a lesser degree, the Supreme Court of the United States have, since 1957, been attempting to come up with a plan for the Knoxville schools that will be obedient to the decision of Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). Such endeavor has produced the following opinions and decisions: Goss v. Board of Education, 186 F.Supp. 559 (E.D.Tenn. 1960); Goss v. Board of Education, 301 F.2d 164 (6th Cir. 1962); Goss v. Board of Education, 373 U.S. 683, 688, 689, 83 S.Ct. 1405, 10 L.Ed.2d 632 (1963); Goss v. Board of Education, 305 F.2d 523 (6th Cir. 1962); Goss v. Board of Education, 270 F.Supp. 903 (E.D.Tenn. 1967); Goss v. Board of Education, 406 F.2d 1183 (6th Cir. 1969); Goss v. Board of Education, 320 F.Supp. 549 (E.D. Tenn.1970).

No effort was made to obtain Supreme Court review of the last of our above decisions. Without such effort, and on November 17, 1969, plaintiffs filed a pleading entitled Motion for Immediate Relief, which asked that "defendant be required to convert to a unitary school system *at once and without any further* delay." This notwithstanding that our last unappealed decision had held that Knoxville had already converted its schools into a "unitary school system." The District Court, however, entertained the motion. Extensive proofs were taken and another plenary opinion entered by District Judge Robert Taylor on July 1, 1970—Goss v. Board of Education, 320 F.Supp. 549 (E.D.Tenn.1970). It is this decision which is the subject of the appeal now before us.

Except for some commands as to improvement in faculty desegregation, some revision of the boundaries of some zones, some improvement in the school record keeping, and correction in enforcement of its transfer policy, Judge Taylor's

opinion and order denied the relief sought by plaintiffs' Motion for Immediate Relief. During the reception of proofs, an interim order was entered on April 3, 1970, limiting consideration to matters that had arisen since June 7, 1967. That was the date of the District Court order which had been affirmed by this Court in its unappealed decision, announced February 10, 1969. It was the District Judge's view that his decision of June 7, 1967, Goss v. Board of Education, 270 F.Supp. 903, so approved by us on February 10, 1969, Goss v. Board of Education, 406 F.2d 1183, was res judicata, or at least the law of the case, as to all matters adjudicated by the 1967 decision.

In Goss v. Board of Education, 270 F.Supp. 903 (E.D.Tenn.1967), District Judge Taylor had held as follows:

> "Since the Knoxville School System is desegregated under the plan which has been in operation since the school year 1963–64 and since the preponderance of the evidence shows that the plan is not being operated to deprive Negro students of their constitutional rights and that Negro school teachers are not being discriminated against because of their race, it is, therefore ORDERED that the various objections to the plan be, and same hereby are, denied * * *." 270 F.Supp. at 918.

In our affirmance of Judge Taylor—Goss v. Board of Education, 406 F.2d 1183 (1969)—we said:

> "We are not sure that we clearly understand the precise intendment of the phrase 'a unitary system in which racial discrimination would be eliminated,' but express our belief that Knoxville has a unitary system designed to eliminate racial discrimination." 406 F.2d at 1191.

Traditional precedents do indeed suggest that those decisions should be considered as having established the law of the case, and that the conduct of Knoxville up to June 7, 1967, as its effort to comply with Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) should not now be judicially revisited. In Judge Taylor's 1967 decision he said:

> "This case having been in this Court since 1959 and the Court being of the opinion as outlined above that the Board and school authorities are moving skillfully and with expedition toward the full integration of the Knoxville School System, that there is no further need for the schools to operate under Court supervision, it is further ordered that the case be stricken from the docket." 270 F.Supp. at 918.

However, in requiring that the case be kept open on Judge Taylor's docket, we said:

> "In the time ahead, and consistent with its need and duty to serve without discrimination its entire school population, the Knoxville Board of Education may wish to consider some pairing of existing schools and some alterations of its plans for future construction. We make no commands in this regard." 406 F.2d at 1191.

We believe, however, that Knoxville must now conform the direction of its schools to whatever new action is enjoined upon it by the relevant 1971 decisions of the United States Supreme Court.

We turn, then, to the cases of Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554, and its companions, all announced on April 20, 1971. Davis v. Board of School Commissioners of Mobile County, 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577; North Carolina State Board of Education v. Swann, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586; McDaniel v. Barresi, 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582; and Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47, 91 S.Ct. 1292, 28 L.Ed.2d 590. Since announcement of these decisions, and relying on them, appellants have filed in this and other appeals before us, what they have denominated Motion of Plaintiff-Appellants to Expedite Determination of Appeals. By

this motion, they ask that we command the District Court to order the Knoxville School Board to forthwith proceed as follows:

1) Direct defendants to file a plan *within two weeks* for the 1971–72 school year that completely dismantles the remaining vestiges of segregation within the system;

2) Direct, without fixing any specific ratios, that such plan, with respect to student assignments, move toward the establishment of a racial balance *substantially the same in each school of the system*, and in this endeavor to employ any desegregation technique necessary, *including busing;*

3) Direct that such plan, with respect to faculty desegregation, establish in *each school* a racial balance of principals, teachers, teacher-aids and other staff working directly with children which substantially reflects the racial composition of each such class of faculty within the entire system; this to be accomplished not later than the commencement of the 1971–72 school year;

4) Allow plaintiffs time to object to any plan proposed by defendants and to file an alternative plan;

5) Directing that the District Judge appoint an educational expert to assist him in arriving at a plan that will meet constitutional standards;

6) Authorize plaintiffs to retain an educational expert to assist them in preparing a plan to be submitted to the District Court, *the cost of such employment and use of such expert to be borne by the defendant school district;*

7) Direct defendants to co-operate with both experts by providing office space at the headquarters of the Superintendent of Schools with full access to all information, plans or studies concerning the system the experts deem necessary, by paying all fees and expenses of the experts, and by providing stenographic assistance, use of office machines, computers, draftsmen, telephone service, and such other professional and technical assistance as may be required;

8) Schedule a prompt hearing on the sufficiency of the submitted plans and take such necessary action as to *assure implementation of a unitary system by the commencement of the 1971–72 school year;*

9) Enjoin any new construction, expansion or abandonment of school facilities until completion of the hearing and thereafter require submission of any such plans to the District Court with notice to the plaintiffs;

10) Direct defendants to file various semi-annual reports with the District Court concerning the racial composition of the school faculties, and if in any year the overall ratio of black to white educators in the various schools does not approximate the ratio of black to white educators in the system, the district shall actively recruit black educators in filling any vacancies; information concerning busing; a description of plans for future school construction, expansion or abandonment, and a map of attendance zones, if such is the method of student assignment approved;

11) Allow plaintiffs their costs, including attorney fees.

Expanding and supplementing the foregoing which we have attempted to reduce in size, is an Appendix A, which sets out in greater detail what the school board must do to accomplish faculty desegregation. Also attached is an Appendix B, entitled "Report" which would have the District Court require semi-annual reports to be filed by the school authorities, giving extensive and detailed reports of the progress of their obedience to the directions of Appendix A.

[1] We are not advised from what material plaintiffs constructed the elaborate rules and directions set out. It is apparent, however, that they are, in substance, the commands of District Judge James B. McMillan, set out in his opinions in Swann v. Charlotte-Mecklenburg Board of Education, 306 F.Supp. 1299

(W.D.N.C.1969) 311 F.Supp. 265 (1970), with some extensions and elaborations. The opinions of Judge McMillan, 306 F. Supp. 1299, 311 F.Supp. 265, and 318 F. Supp. 786, affirmed by the Supreme Court in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), express with some asperity his pique that the school authorities had failed to fully adopt a plan constructed by an expert, Dr. John Finger, who had been appointed by the District Judge. The District Court opinions reflect in observable measure Judge McMillan's doubts as to the genuineness of the school authorities' concern for the constitutional rights of both the black and white school children of Charlotte and Mecklenburg Counties. The broadness of their commands bespeak some motivation of reprisal. In the long history of the litigation we deal with, we find no such bitter contesting between the school authorities of Knoxville and the court, nor between the plaintiffs and the school authorities. We, therefore, initially observe that while the Supreme Court found legally tolerable what may be referred to as the *Mecklenburg* rule, it by no means directed that its commands be obeyed everywhere. We, therefore, conclude that there is nothing in *Swann* (1971) that requires us to announce a fiat imposing on Knoxville the identical pattern fashioned by Judge McMillan for his case.

Respectfully, we read Swann v. Charlotte-Mecklenburg Bd. of Ed. (1971), as primarily a command to all school authorities in states where *de jure* segregation was once the rule, to do a better job of mixing the races and teaching staffs than they have heretofore done. We set out, however, what we think are its clear commands as well as its views as to what is desirable and permissible.

I

[2] The neighborhood style of desegregation no longer can be viewed as per se constitutional. This is so notwithstanding that such was the substantial holding of the Fourth Circuit in its 1966 decision of Swann v. Charlotte-Mecklenburg Bd. of Ed., 369 F.2d 29 (4th Cir.). It there affirmed a District Court decision—Swann v. Charlotte-Mecklenburg Bd. of Ed., 243 F.Supp. 667 (1965)—which had said:

> "Thus far it has not been held *unconstitutional* to assign children to a school on the basis of their residences in a cohesive and contiguous geographical area." 243 F.Supp. at 670 (Emphasis supplied.)

And then went on to say:

> "Whatever the Board may do in response to its own initiative or that of the community, we have held that there is no constitutional requirement that it act with the conscious purpose of achieving the maximum mixture of races in the school population." 369 F.2d at 32.

The concurring opinion of Judges Sobeloff and Bell quoted from their opinion in Gilliam v. School Bd. of City of Hopewell, 345 F.2d 325, 329 (1965):

> " 'The neighborhood school concept is a legitimate one, and insofar as zone boundaries are drawn without racial discrimination along natural geographical lines we agree that they may be accepted as valid.' " 369 F.2d at 34.

Such concurring opinion went on to recite their previous views that,

> "This is far from suggesting that children are to be uprooted arbitrarily and bussed against their will to distant places merely to place them with children of the other race. No such thing has been proposed or contemplated in Richmond or, so far as we know, anywhere in this circuit." 369 F.2d 34.

In this court's *first* consideration of this case—now before us for the fourth time—we held valid Knoxville's use of the neighborhood plan as a method of obeying *Brown*. Goss v. Bd. of Ed., 301 F.2d 164, 166 (6th Cir. 1962). The Supreme Court had that decision before it on certiorari but limited its criticism to a freedom of choice plan. Goss v. Bd.

of Ed., 373 U.S. 683, 83 S.Ct. 1045, 10 L.Ed.2d 632 (1963). In Goss v. Bd. of Ed., 305 F.2d 523 (6th Cir. 1962), we looked again at Knoxville's plan. The neighborhood plan of integration was not questioned there by the plaintiff. Certiorari was not sought. In 1969 we again considered the neighborhood system plan of integration. Goss v. Bd. of Ed., 406 F.2d 1183 (6th Cir. 1969). We specifically found that Knoxville's plan of neighborhood integration was constitutional. The plaintiffs did not seek Supreme Court review of that decision.

We make this review to make clear why we do not by our remand direct the District Judge to decree that the Knoxville school authorities forthwith put into effect the detailed formulae set out in the plaintiffs' current motion. We will not impose a rigid timetable for the accomplishment by Knoxville of whatever may replace or revamp the neighborhood zone plan, should the District Court consider that 1971 *Swann* requires revision. We observe no crisis in the Knoxville school system that can be met only by plans hastily fashioned to be ready for the fall term of 1971. Such effort might invite fresh attacks by plaintiffs and bring on new rounds of litigation, the expense of which, including the fees of plaintiffs' attorneys and experts, would be underwritten by the Knoxville school system. We have confidence that the District Judge will move with proper dispatch to bring about a new system that will follow the commands as well as the exhortations of the *Swann* (1971) and companion cases.

II

North Carolina State Bd. of Ed. v. Swann, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971) announces that any state statute or constitutional provision that forbids the transportation of school children by bus or otherwise to accomplish a better racial balancing of school population will be denied enforcement. Swann v. Charlotte-Mecklenburg, *supra*, 402 U.S. 1, 91 S.Ct. 1267 (1971), approved a District Court ordered plan for the busing of children to improve the racial mix in the involved school system. It did not, however, direct that a plan of transporting school children must be a part of every new plan for improvement of the objective of desegregation.

III

[3] *Swann* (1971) makes clear that the constitutional prohibition against assigning students or teachers on account of race is applicable only to *minority* groups. Even though it has been said that the desiderata of the *Brown* rule are that we have no black or white schools—only schools—and that public officials be "color blind" in discharging their duties, until these desiderata have been accomplished race will have to be considered in arranging today's school society. In the last decision prior to *Swann* (1971) that dealt with this question—Alexander v. Holmes County Bd. of Ed., 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed. 2d 19 (1969)—the Supreme Court's opinion said:

> "Each of the school districts here involved may no longer operate a dual system based on race or color, and directing that they begin immediately to operate as unitary school systems within which *no person* is to be effectively excluded from any school *because of race or color*." 396 U.S. at 20, 90 S.Ct. at 29. (Emphasis supplied.)

In Swann v. Charlotte-Mecklenburg Bd. of Ed., *supra*, the dimension of this constitutional right is narrowed, at least until the elimination "root and branch" of the former *de jure* segregation.

> "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil *of a racial minority* from any school, directly or indirectly on account of race * * *." 402 U.S. 23, 91 S.Ct. at 1279.

The thought is expanded in North Carolina State Board of Ed. v. Swann et al., 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971), where the Court said:

> "Just as the *race* of students must be considered in determining whether a

constitutional violation has occurred, so also must *race* be considered in formulating a remedy." 402 U.S. 46, 91 S.Ct. at 1286.

It is clear, therefore, that in carrying out a busing plan to accomplish a fixed or approximate racial balance—now clearly approved by *Swann*—some white children must be moved out of the schools of their families' long time neighborhood, solely because they are white. Likewise, it may be that some Negro children will be compelled to give up attendance at a school in which they would prefer to remain. In Swann v. Charlotte-Mecklenburg Board of Education, 306 F.Supp. 1291, the District Judge disposed of objections by both black and white to his plan in this way:

> "A correspondent who signs 'Puzzled' inquires:
>
> *'If* the whites don't want it and the blacks don't want it, why do we have to have it?'
>
> The answer is, the Constitution of the United States." 306 F.Supp. at 1293.

It would appear, therefore, that some disparate treatment in favor of racial *minorities* must be tolerated until the "vestiges" of *de jure* segregation have been eliminated. In *Swann*, 1971, Chief Justice Burger said:

> "At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown* I. The systems will then be 'unitary' in the sense required by our decisions in *Green* [Green v. County School Board, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716] and *Alexander*.
>
> "It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." 402 U.S. 31–32, 91 S.Ct. at 1283.

IV

[4] *Swann* (1971) fixes no formulae for what must be done or what will be acceptable in efforts to arrive at a better racial mix in the schools. It does, however, lay on school authorities the duty to take some affirmative action toward improvement. While the existence of some all black or all white schools is not struck down as *per se intolerable*, school authorities will have to justify their continuance by something more than the accident or circumstance of neighborhood. Consideration of pairing of school zones, contiguous or non-contiguous, should be given; arrangement of new construction so as to further desegregation will be a legitimate objective, not to the detriment, however, of the discharge of school authorities' total and overriding responsibilities. This we urged, but did not particularize any command, when we last remanded this to the District Court. The District Judge who has handled this case can understand the commands and admonitions that come freshly to the Courts by these latest Supreme Court decisions. We need not construct a set of rules that will provide better guidelines than did the Supreme Court in these latest landmark decisions. The Supreme Court's opinion forbids an attempt by us to dictate just what racial mix should be arranged.

> "The District Judge went on to acknowledge that variation 'from that norm may be unavoidable.' This contains intimations that the 'norm' is a fixed mathematical racial balance reflecting the pupil constituency of the system. If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. *The constitutional command to desegregate schools does not mean that every school in*

every community must always reflect the racial composition of the school system as a whole." Swann et al. v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 23-24, 91 S.Ct. 1267, 28 L.Ed.2d 554. (Emphasis supplied.)

V

Swann, 1971, forbids the use of our decisions in Deal v. Cincinnati Bd. of Ed., 369 F.2d 55 (6th Cir. 1966), cert. denied 389 U.S. 847, 88 S.Ct. 39, 19 L.Ed.2d 114 and Deal v. Cincinnati Bd. of Ed., 419 F.2d 1387, cert. denied because of late filing, 402 U.S. 962, 91 S.Ct. 1630, 29 L.Ed.2d 128, to justify a plan of desegregation in a state which employed *de jure* segregation until the *Brown* decision. Likewise the Seventh Circuit decision in Bell v. School City of Gary, Ind., 324 F.2d 209 (7th Cir. 1963), cert. denied 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216, may not be relied upon for such purpose. In those cases the states involved had, long prior to *Brown*, abolished state-imposed segregation. The segregation complained of in those cases resulted, not from discrimination by Boards of Education, but primarily from residential patterns over which the Board had no control and for which it was in no wise responsible. In *Deal* I and II we held that the Board could not be faulted for the socio-economic levels of our society and that the Constitution did not require the Board to take affirmative action to eradicate segregation caused thereby in order to maintain racial balance in the public schools. We construed the Constitution as prohibiting discrimination. Chief Justice Burger recognized the distinction between *de jure* and so-called *de facto* segregation in *Swann* and limited the holding to the former. We need not ponder whether this prophesies that a different rule will ultimately emerge, applicable only to states not having the remnants of *de jure* segregation.

We conclude by expressly withholding any direction of any particular timetables in which Knoxville must conform to what is directed by the latest Supreme Court opinions. With great respect for an opposite view, we are satisfied that until these decisions of 1971 there was quite respectable opinion that the *Brown* decision was satisfied by the neighborhood plan of school zoning. In a District Court opinion in Swann v. Charlotte-Mecklenburg Bd. of Ed., *supra*, it is said:

> "For years people of this community and all over the south have quoted wistfully the statement in Briggs v. Elliott, D.C., 132 F.Supp. 776 by Judge John J. Parker (who at his death was one of my few remaining heroes) *that though the Constitution forbids segregation it does not require integration.* Passage of time, and the revelation of conditions which might well have changed Judge Parker's views if he had lived, have left Judge Parker's words as a landmark but no longer a guide." 306 F.Supp. at 1294. (Emphasis supplied.)

Therefore, if it has taken the federal judiciary of this country 17 years to come up with final answers, it would be judicially arrogant for us to tell the school authorities of Knoxville to get the job done in the few months that will be available before the opening of the 1971 fall session. Plaintiffs urge that we direct the District Court and authorize plaintiffs to employ an expert or experts to draw the blueprint for obedience to *Swann's* directions. We do not know where you obtain or what creates such experts. Across the land today experts can be hired to sustain the colliding positions of the adversaries in most any contest. We will not insist that the District Judge discharge his responsibilities by resolving contests between hired experts.[1]

1. We do believe, however, that the District Court should now require the school board to prepare and maintain a pupil locater map.

The hope, or dream, that one day we will have become a people without any motivations born of our differing racial beginnings will have a better chance of fulfillment if patience accompanies our endeavors. Strident and truculent judicial commands could indeed exacerbate what may now remain of racial bias and prejudice.

In the first reported case involving desegregation in Knoxville, Goss v. Board of Education, 186 F.Supp. 559 (E.D. Tenn.1960), Judge Taylor in emphasizing his own awesome responsibilities said:

> "As the case has developed, the ultimate responsibility for decision rests with the Court. It alone must deal with the realities—realities with which it has had acrid experience.
>
> "If it decides wrongly, the transition toward the goal of a harmonious and unified school system—a goal to which all parties to this case subscribe—will receive an untold setback. If it decides rightly, there may well be smooth and steady progress toward full integration. Some individuals, parties to this case, will not themselves benefit from the transition. At a turning point in history some, by the accidents of fate, move on to the new order. Others, by the same fate, may not. If the transition is made successfully, these plaintiffs will have had a part. Moses saw the land of Judah from Mount Pisgah, though he himself was never to set foot there." 186 F.Supp. at 569.

We remand this case to the District Court for further proceedings consistent with Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554, and the other relevant Supreme Court opinions announced on April 20, 1971.

The parties shall bear their respective costs on this appeal.